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WALKING THE TIGHT ROPE AND NOT THE PLANK: A PROPOSED STANDARD FOR SECOND-LEVEL APPELLATE REVIEW OF EQUITABLE MOOTNESS DETERMINATIONS

INTRODUCTION

Imagine you operate a business forced into bankruptcy. You spend months struggling to keep your business afloat as you negotiate the bankruptcy process, all to craft a plan that could both satisfy enough of your creditors and convince a bankruptcy judge that it would return your business to an economically viable state. Over the objections of a few, standoffish parties—a few minor creditors, perhaps, or the former equity holders—the judge confirms the plan. Even as the dejected parties appeal, the judge allows you to begin the process of your economic rebirth. By the time your case is heard by the first-level appellate court,¹ you have achieved most of what the plan required. The court, weighing equitable concerns and invoking the doctrine of equitable mootness, refuses to entertain the appeal because doing so would upset the reorganization plan. Still unsatisfied, the parties appeal even further to the court of appeals. Now an additional issue arises: how will that court review the lower court's determination that the appeal of one or more claims is moot? Reviewing the determination without any deference whatsoever could result in the reversal of hundreds of complex and tricky financial transactions, potentially wrecking the debtor's reorganization. Yet if the court grants too much deference, it all but denies the appellant her right to a meaningful appeal.

During the widespread economic chaos of the past few years, the United States has become intimately familiar with bankruptcy.² Businesses have not been spared these pressures and, like the rest of the nation, have filed dutifully

¹ Throughout this Comment, “first-level appellate court” refers to either a district court or bankruptcy appellate panel, and “second-level appellate court” refers to a circuit court of appeals.

² There were over 1.4 million bankruptcy cases filed in 2009, representing an uptick of 11.1% from 2000 and a 34.5% increase from 2008. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 1 (2010), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf>. Ninety-three of the ninety-four districts reported increases in the number of filings. *Id.* at 3. These numbers also represent the highest number of filings since the benchmark year of 2005, when the masses rushed to file before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) took effect. *Id.* at 19.

into bankruptcy courts.³ Although most of these businesses liquidated,⁴ many sought shelter in chapter 11 to prevent their businesses from folding.⁵ The flexible structure of chapter 11 reorganizations allows the corporate debtor to reform its financial affairs to preserve the inherent value of the business for the benefit of all parties involved.⁶ However, there are many pressures that encourage the debtor to exit bankruptcy as soon as possible. For instance, many debtors require funding to survive. In the short run, the debtor needs this capital immediately to continue normal business operations while navigating the bankruptcy process.⁷ In the long run, the funding necessary to survive outside of bankruptcy may be contingent on plan confirmation.⁸ Chapter 11 of the Bankruptcy Code (Code) attempts to balance the interests of involved parties by favoring speedy and final resolution to aid the debtor to quickly reemerge as a viable entity.⁹ On occasion, however, a focus on quick resolutions in bankruptcy reorganizations can run counter to other important judicial concerns inherent in federal appellate proceedings.¹⁰

³ Chapter 11 filings increased from 8,785 in 2008 to 14,745 in 2009, a 68% jump. *Id.* at 22. 13,439 of the chapter 11 cases filed in 2009 were business filings. *Id.* at 291 tbl.F-2. Eighty districts reported increases in the number of chapter 11 filings. *Id.* at 22.

⁴ In 2009 alone, there were 40,225 business bankruptcy filings under chapter 7, nearly three times the number of chapter 11 business filings. *Id.* at 291 tbl.F-2.

⁵ For example, Borders Group Inc. initially filed for protection under chapter 11 with the intent to reorganize. *See* Joseph Checkler & Jeffrey A. Trachtenberg, *Bookseller Borders Begins a New Chapter . . . 11*, WALL ST. J., Feb. 17, 2011, at B1. However, such attempts ultimately failed, and Borders was forced to begin the liquidation process in July 2011. Mike Spector & Jeffrey A. Trachtenberg, *Borders Forced to Liquidate, Close All Stores*, WALL ST. J., July 19, 2011, at B1.

⁶ H.R. REP. NO. 95-595, at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179; *see also* Richard M. Cieri, Scott J. Davido & Heather Lennox, *Applying an Ax When a Scalpel Will Do: The Role of Exclusivity in Chapter 11 Reform*, 2 J. BANKR. L. & PRAC. 397, 401 (1993) ("The overriding purpose of [c]hapter 11 of the Bankruptcy Code is to provide a troubled business the chance to catch its financial breath, propose a plan to reorganize and to thereby allow it an opportunity to cure its financial ills and continue in business." (footnotes omitted) (internal quotation marks omitted)).

⁷ *See* Melanie Cohen, *Chicago Deep-Dish Pizza Chain Giordano's Enters Bankruptcy*, WALL ST. J. BANKR. BEAT (Feb. 17, 2011, 5:08 PM), <http://blogs.wsj.com/bankruptcy/2011/02/17/chicago-deep-dish-pizza-chain-giordanos-enters-bankruptcy> ("In court papers, Giordano's said it has 'an urgent and immediate need for cash to continue to operate.'").

⁸ *See, e.g.,* Retired Pilots Ass'n of US Airways, Inc. v. US Airways Grp., Inc. (*In re* US Airways Grp., Inc.), 369 F.3d 806, 809 (4th Cir. 2004) (allowing the corporate debtor to receive \$1.24 billion upon emerging from chapter 11 because it met its financial projections).

⁹ *See* H.R. REP. NO. 95-595, at 220-22.

¹⁰ *See* Lindsey Freeman, Comment, *BAPCPA and Bankruptcy Direct Appeals: The Impact of Procedural Uncertainty on Predictable Precedent*, 159 U. PA. L. REV. 543, 546 (2010) ("[T]he problems direct appeals create highlight a tension inherent in bankruptcy law: the need to balance practical considerations such as speed, efficiency, and specialized review, with constitutional values, including fairness, due process, and the right to an appeal.").

To address the proper balance for these competing interests, appellate courts fashioned the doctrine of equitable mootness. This judicially crafted doctrine allows a court to avoid determining an appeal on its merits when doing so would inequitably burden the interests of third parties or interfere with the debtor's chances of reorganization.¹¹ Although the concept arose soon after the Code's enactment in 1978,¹² interest in equitable mootness has renewed during the recent economic crisis in the courtroom¹³ as well as in scholarship.¹⁴ However, one question that continues to divide circuits is the appropriate standard of review applied to a district court's or bankruptcy appellate panel's determination that an appealed claim is equitably moot.¹⁵

The rather cursory treatment of this issue by most courts¹⁶ is at odds with the issue's complexity and importance. A first-level appellate court's legal and factual judgments in bankruptcy are generally reviewed without deference because it is not the first court to review the underlying case.¹⁷ However, the normal state of affairs is complicated by the fact that the first-level appellate

¹¹ See, e.g., *Alta. Energy Partners v. Blast Energy Servs., Inc. (In re Blast Energy Servs., Inc.)*, 593 F.3d 418, 424 (5th Cir. 2010) ("Equitable mootness authorizes an appellate court to decline review of an otherwise viable appeal of a [c]hapter 11 reorganization plan, but only when the reorganization has progressed too far for the requested relief practicably to be granted.").

¹² See Lenard Parkins et al., *Equitable Mootness: Will Surgery Kill the Patient?*, AM. BANKR. INST. J., Sept. 2010, at 40, 40.

¹³ See, e.g., *In re Blast Energy Servs., Inc.*, 593 F.3d at 424–26; *B & M Inv., LLC v. Calise (In re Calise)*, 354 F. App'x 510, 513 (2d Cir. 2009); *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1337–48 (10th Cir. 2009); *Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 240–43 (5th Cir. 2009); *Wooley v. Faulkner (In re SI Restructuring, Inc.)*, 542 F.3d 131, 135–37 (5th Cir. 2008); *Liquidity Solutions, Inc. v. Winn-Dixie Stores, Inc. (In re Winn-Dixie Store, Inc.)*, 286 F. App'x 619, 623–24 (11th Cir. 2008) (per curiam); *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 947–51 (6th Cir. 2008).

¹⁴ See generally Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals*, 19 NORTON J. BANKR. L. & PRACT. 33 (2010); Parkins et al., *supra* note 12; Freeman, *supra* note 10; Katelyn Knight, Comment, *Equitable Mootness in Bankruptcy Appeals*, 49 SANTA CLARA L. REV. 253 (2009); Caroline L. Rosiek, Note, *Making Equitable Mootness Equal: The Need for a Uniform Approach to Appeals in the Context of Bankruptcy Reorganization Plans*, 57 SYRACUSE L. REV. 685 (2007).

¹⁵ Compare *In re Paige*, 584 F.3d at 1334–36 (reviewing equitable mootness for an abuse of discretion), with *United States ex rel. FCC v. GWI PCS 1 Inc. (In re GWI PCS 1 Inc.)*, 230 F.3d 788, 799–800 (5th Cir. 2000) (reviewing equitable mootness de novo).

¹⁶ See, e.g., *In re GWI PCS 1 Inc.*, 230 F.3d at 799–800 (addressing the issue in half a page).

¹⁷ See, e.g., *In re Cont'l Airlines*, 91 F.3d 553, 568 n.4 (3d Cir. 1996) (en banc) (Alito, J., dissenting) ("[T]here is an unbroken and well-established line of authority from this court holding that '[b]ecause the district court sits as an appellate court in bankruptcy cases, our review of the district court's decision is plenary.'" (second alteration in original) (quoting *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 324 (3d Cir. 1995))).

court is the first possible body to determine the issue of equitable mootness,¹⁸ and doctrines grounded on equity or prudence are generally reviewed with some deference.¹⁹ Furthermore, standards of review are important. Because they can be outcome determinative,²⁰ standards of review both inform the potential appellant of how strong its case must be to be successful on appeal and allow parties to articulate their arguments appropriately.²¹

Addressing this issue, this Comment recommends a middle course. It proposes that, for doctrinal and practical reasons, determinations of equitable mootness should be reviewed for an abuse of discretion. However, numerous scholars have recognized that the deference granted under the abuse of discretion standard is more of a spectrum than a single, easily definable standard.²² Therefore, this Comment also suggests that courts of appeals should be more willing to overturn determinations of equitable mootness than other issues reviewed for an abuse of discretion.

This Comment will first trace the path of a second-level appellate review of a typical equitable mootness case from the bankruptcy court to the court of appeals in Part I. Next, Part II will discuss the Tenth Circuit's adoption of the abuse of discretion standard in *Search Market Direct, Inc. v. Jubber (In re Paige)* for the review of first-level appellate equitable mootness determinations. Part II will also describe how the various circuits have (or have not) addressed the issue. Part III will then address the heart of the issue: when and how much deference should be accorded to a lower court's determination of equitable mootness. This Comment will also define a theoretical framework through Supreme Court precedent and scholarship in Part III. Next, this Comment will demonstrate why an equitable mootness determination should be reviewed for an abuse of discretion in Part IV. Finally, this Comment will

¹⁸ See *In re United Producers, Inc.*, 526 F.3d at 953 (Kennedy, J., concurring) (noting that equitable mootness is "the only [doctrine this judge knew of] where the intermediate court will be deciding an equitable issue for the first time and is the proper body to decide that issue for the first time").

¹⁹ See 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 4.16, at 4-134 (4th ed. 2010).

²⁰ See, e.g., *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 191–92 (3d Cir. 2001) (Alito, J., concurring) (continuing to disagree fundamentally with the equitable mootness doctrine, but affirming the lower court's judgment since the lower court "did not commit an abuse of discretion").

²¹ See Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 241–42, 255 (2009).

²² See Henry J. Friendly, Lecture, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 762–67 (1982); Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 213–18; Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 650–53 (1971).

address the policy and doctrinal reasons why a court should more thoroughly question a lower court's finding of equitable mootness and offer suggestions to aid the application of this standard in Parts V and VI, respectively.

I. THE PATH FROM THE BANKRUPTCY COURT TO REVIEW BY THE COURT OF APPEALS

A. *Confirmation of the Plan—An Overview*

Although courts have not limited equitable mootness solely to reorganization plans or even bankruptcy appeals,²³ the doctrine developed primarily in the context of chapter 11 reorganization plans.²⁴ Given its origins and continued preeminence there, this Comment limits its discussion on pre-appellate activity to the formation and confirmation of chapter 11 plans.

1. *Proposing, Voting, and Confirming a Viable Plan—§§ 1121–1129*

All chapter 11 plans follow generally defined structures within the Code. Section 1123(a) outlines the required elements for a plan to be confirmed.²⁵ Many of these requirements focus on how claims or interests will be treated by the plan.²⁶ Importantly for present purposes, a plan proponent must define “classes” of claims and groups of interests which can only contain claims or interests that are “substantially similar” to one another.²⁷ Additionally, the plan must spell out which classes of claims or interests are impaired or unimpaired,²⁸ and the actions that will be taken to implement the plan.²⁹

²³ See Dennis J. Connolly & Sage M. Sigler, *Section 363 Revisited: The Limitations on “Free and Clear” Sales*, NORTON BANKR. L. ADVISER, Nov. 2008, at 5, 7 (addressing the concept of equitable mootness in § 363 sales); see also Parkins et al., *supra* note 12, at 41 & nn.15–19 (citing additional instances unrelated to reorganizations in which courts had considered the doctrine).

²⁴ See *TNB Fin., Inc. v. James F. Parker Interests (In re Grimland, Inc.)*, 243 F.3d 228, 231 n.4 (5th Cir. 2001) (“Equitable mootness normally arises where a [c]hapter 11 reorganization plan is at issue.”); Parkins et al., *supra* note 12, at 40 (“[T]he doctrine was judicially created in recognition of the fact that it would be inequitable, in certain circumstances, to overturn a confirmed plan of reorganization.”).

²⁵ See 11 U.S.C. § 1123(a) (2006) (“Notwithstanding any otherwise applicable nonbankruptcy law, a plan *shall* . . .”) (emphasis added).

²⁶ See *id.* § 1123(a)(1)–(4).

²⁷ See *id.* §§ 1122(a), 1123(a)(1). “Substantially similar,” though not defined in the Code, has been read to require claims or interests possessing similar “legal character or effect” against or in the debtor be grouped together. 7 COLLIER ON BANKRUPTCY ¶ 1122.03[3] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).

²⁸ See 11 U.S.C. § 1123(a)(2)–(3). A class is “impaired” if the plan alters the rights of the claim or interest holder or does not correct preexisting legal, equitable or contractual issues. See *id.* § 1124.

²⁹ *Id.* § 1123(a)(5).

Finally, the Code also allows a plan to include a number of nonrequired actions.³⁰

Once a chapter 11 plan has been drafted, its proponent must present it to claim or interest holders for approval before it can be confirmed.³¹ Holders of claims or interests vote on the plan individually.³² However, a plan is accepted or rejected solely by classes of interests or claims, not individuals.³³ A class of claims accepts a plan if over fifty percent of the voting claim holders accept the plan and if these accepting claim holders hold at least two-thirds of the total aggregate dollar amount of the claims in the class.³⁴ A class of interests, on the other hand, accepts a plan merely when the holders of two-thirds of the amount of allowed interests accept the plan.³⁵ Classification under § 1122 thus “greatly affects whether the plan will ultimately be accepted by creditors and interest holders.”³⁶ Furthermore, classifying a class as impaired or not impaired determines whether the individual claim or interest holders comprising the class get any say in accepting or rejecting the plan.³⁷

Once a plan meeting the requirements of § 1123(a) has been proposed and voted upon by claim or interest holders, the court holds a confirmation hearing.³⁸ During this hearing, any party in interest can object to confirmation.³⁹ The court can confirm a plan only if it meets the applicable provisions of § 1129; it is given no discretion to demand less or more of a

³⁰ See, e.g., *id.* § 1123(b); 7 COLLIER, *supra* note 27, ¶ 1123.02.

³¹ See 11 U.S.C. § 1126.

³² See *id.* § 1126(a).

³³ David Arthur Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 VA. L. REV. 461, 477 (1992) (“[T]he emphasis of [§] 1126 rests on whether the class as a whole votes for or against the plan.”).

³⁴ 11 U.S.C. § 1126(c).

³⁵ *Id.* § 1126(d).

³⁶ Richard M. Cieri, Barbara J. Oyer & Dorothy J. Bimbryer, “*The Long and Winding Road*”: *The Standards To Confirm a Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (Part II)*, 3 J. BANKR. L. & PRAC. 115, 128–29 (1994).

³⁷ See 11 U.S.C. § 1126(f)–(g). If a class is not impaired under the plan, the courts will “conclusively presume[]” that the class has accepted the plan and the plan proponent does not have to solicit votes from that class. *Id.* § 1126(f). On the other hand, if a class is denied any recovery or retention under the plan, it is deemed to reject the plan, thus eliminating the need to solicit votes. *Id.* § 1126(g). These totally impaired classes must be “crammed down” under § 1129(b) for the plan to be confirmed. See 6 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, NORTON BANKRUPTCY LAW & PRACTICE 3D § 110:23, at 110-72 to -73 (2008) (“[I]f the plan is to be confirmed over the voluntary or deemed dissent of one or more classes, it must satisfy the standards for cramdown under Code § 1129(b).”).

³⁸ 11 U.S.C. § 1128(a). Unlike many other sections in the Code that require “notice and a hearing,” courts must hold an actual hearing to confirm a plan.

³⁹ *Id.* § 1128(b).

plan⁴⁰ and instead must exercise “a mandatory independent duty to determine whether the plan has met all of the requirements necessary for confirmation.”⁴¹ Section 1129 outlines the requirements that a plan proponent must demonstrate before a plan can be confirmed. Some requirements only apply in specific cases,⁴² but others apply to all chapter 11 cases.⁴³ Such general requirements include, but are not limited to: that the plan be proposed legally and in good faith;⁴⁴ that at least one class of impaired claims accepts the plan if any class of claims are impaired;⁴⁵ that each individual claim or interest holder who has not accepted the plan will receive at least as much as she would in a chapter 7 liquidation;⁴⁶ and that the proposed plan is unlikely to be followed by liquidation or further financial reorganization.⁴⁷

Furthermore, § 1129(a) contemplates that a plan will only be confirmed if all impaired classes have accepted the plan by § 1126’s required majorities.⁴⁸ However, unlike all the other subparts of § 1129(a),⁴⁹ the Code allows a plan proponent to bypass subsection (a)(8)’s dictates and confirm a plan over the rejection of an impaired class of claims or interests.⁵⁰ To do so, the plan proponent must meet two additional requirements to “cram down” these objecting classes. First, the plan cannot discriminate unfairly against a dissenting class.⁵¹ Second, the plan must be “fair and equitable” to each impaired class.⁵² This power is not unlimited, however, as the plan proponent is the only individual allowed to request that a class be crammed down,⁵³ and at least one impaired class of claims must still affirmatively accept the plan.⁵⁴

⁴⁰ See *id.* § 1129(a) (“The court *shall* confirm a plan *only if* all of the following requirements are met”) (emphasis added); *id.* § 1129(b) (requiring confirmation if alternative requirements to § 1129(a)(8) are met).

⁴¹ *In re Holthoff*, 58 B.R. 216, 218 (Bankr. E.D. Ark. 1985), *quoted in* *Williams v. Hibernia Nat’l Bank* (*In re Williams*), 850 F.2d 250, 253 (5th Cir. 1988).

⁴² See 7 COLLIER, *supra* note 27, ¶ 1129.02[6], [13]–[16].

⁴³ See 11 U.S.C. § 1129(a)(1)–(5), (7), (9)–(12).

⁴⁴ *Id.* § 1129(a)(3).

⁴⁵ *Id.* § 1129(a)(10).

⁴⁶ *Id.* § 1129(a)(7).

⁴⁷ *Id.* § 1129(a)(11).

⁴⁸ See *id.* § 1129(a)(8).

⁴⁹ 7 COLLIER, *supra* note 27, ¶ 1129.02[8] (“The condition set forth in [§] 1129(a)(8) is the only condition precedent which is not absolutely necessary for confirmation.”).

⁵⁰ See 11 U.S.C. § 1129(b)(1).

⁵¹ *Id.*

⁵² *Id.*

⁵³ 6 NORTON, *supra* note 37, § 113:2, at 113-4.

⁵⁴ 11 U.S.C. § 1129(a)(10).

2. *Illustrative Reasons Why Parties Might Appeal a Confirmed Chapter 11 Plan*

Before turning to the structure of bankruptcy appeals, a few illustrative examples will be useful to demonstrate why a party would appeal the confirmation of a reorganization plan. A party could believe it was lumped together with a dissimilar claim to impermissibly gerrymander a class vote,⁵⁵ or was crammed down while an artificially impaired class⁵⁶ was used to satisfy § 1129(a)(10).⁵⁷ Because the minimum amount that a dissenting party is guaranteed to receive is defined by the strictly mechanical distribution of chapter 7,⁵⁸ undervaluation of a key asset could deprive a crammed-down claim or interest holder from potentially recovering on her claim.⁵⁹ Retired parties might believe that the reorganizing debtor was improperly allowed to eliminate their pension plan.⁶⁰ Appellants could be concerned that prepetition management, whose illegal prepetition conduct had led the corporation to bankruptcy, will remain in control during the reorganization.⁶¹ In these and similar situations, parties would wish to use the appeals process to guarantee that the correct decision was reached below.

B. The Bankruptcy Appeals Process

As the doctrine of equitable mootness arises primarily within the framework of the bankruptcy appellate system, a brief examination of these structures and their underlying policies is prudent. Appeals in bankruptcy proceedings are subject to starkly conflicting demands. There is a particular need for finality in bankruptcy: the more the potential buyers' reliance interests are protected, the more they will rely on bankruptcy determinations and pay higher prices for the debtor's assets than they would if the "assets [could] be

⁵⁵ See 7 COLLIER, *supra* note 27, ¶ 1122.03[5].

⁵⁶ An "artificially impaired" class is a class of claims whose rights are modified specifically to create an accepting impaired class as required by § 1129(a)(10). *See id.* ¶ 1124.03.

⁵⁷ See, e.g., Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 238, 250–51 (5th Cir. 2009).

⁵⁸ See 11 U.S.C. § 1129(a)(7); 7 COLLIER, *supra* note 27, ¶ 1129.02[7][b].

⁵⁹ See, e.g., Nordhoff Invs., Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 183–84 (3d Cir. 2001) (interest holders appealed a \$300 million valuation of debtor, claiming debtor was actually worth \$1.05 billion).

⁶⁰ See, e.g., Retired Pilots Ass'n of US Airways, Inc. v. US Airways Grp., Inc. (*In re* US Airways Grp., Inc.), 369 F.3d 806, 807–09 (4th Cir. 2004).

⁶¹ See, e.g., Curreys of Neb., Inc. v. United Producers, Inc. (*In re* United Producers, Inc.), 526 F.3d 942, 945 (6th Cir. 2008).

snatched back or otherwise affected by subsequent events.”⁶² However, the right to meaningful appeal, even though not constitutionally guaranteed in all cases, is also deeply ingrained in American jurisprudence.⁶³

All appeals from a bankruptcy court are raised pursuant to 28 U.S.C. § 158. Section 158 offers three routes for an appellant to pursue review of core matters.⁶⁴ The two most common routes include either appealing to the district court embracing the district in which the bankruptcy judge sits,⁶⁵ or to the BAP if the circuit has established one.⁶⁶ A third option—a direct appeal to the court of appeals embracing the district in which the bankruptcy court is located—is also available in certain situations.⁶⁷

Parties who wish to appeal a result from the bankruptcy court are entitled to have the judgment reviewed by the district court.⁶⁸ Appeals are available as a matter of right for all “final judgments, orders, and decrees,”⁶⁹ as well as from interlocutory orders changing the time periods set out in 11 U.S.C. § 1121.⁷⁰ A court’s confirmation of a reorganization plan, which effectively ends many disputes related to a reorganization effort,⁷¹ can be appealed immediately

⁶² *In re UNR Indus., Inc.*, 20 F.3d 766, 770 (7th Cir. 1994) (noting further that this protection benefits creditors as a whole by ensuring that the estate gets good returns in leveraging its assets). Several provisions of the Code thus limit the ability of parties to interfere with these settled expectation interests. *See, e.g.*, 11 U.S.C. § 364(e) (forbidding reversal on appeal of extension of credit for debt, priority interest, or lien in good faith from affecting such debt’s validity unless the incurring of debt was stayed pending appeal); *Id.* § 1141(c) (stripping the debtor’s property of all prepetition claims or interests upon confirmation of the plan unless the plan or confirmation order provides otherwise).

⁶³ Rosenberg, *supra* note 22, at 641–42; *see* U.S. CONST. art. III, § 2, cl. 2 (requiring—at bare minimum—a grant of appellate jurisdiction to the Supreme Court, “with such Exceptions, and under such Regulations as the Congress shall make”).

⁶⁴ *See* 28 U.S.C. § 158(a), (b)(1), (d)(2)(A) (2006). The Code divides issues in bankruptcy cases into two groups: core and noncore proceedings. *See id.* § 157(b). A bankruptcy court cannot issue a final judgment on noncore matters, unless all parties consent to the bankruptcy court’s jurisdiction. *Id.* § 157(c). If all parties do not consent, the bankruptcy court can only offer proposed findings of fact and conclusions of law, which the district court must then review de novo. *Id.* § 157(c)(1). In situations where the district court serves as a trial court in hearing bankruptcy matters, appeals from the district court’s bankruptcy determinations are made to the court of appeals by way of 28 U.S.C. § 1291. 8 NORTON, *supra* note 37, § 170:19, at 170–74.

⁶⁵ 28 U.S.C. § 158(a); *see* 1 COLLIER, *supra* note 27, ¶ 5.02[1].

⁶⁶ 28 U.S.C. § 158(b)–(c).

⁶⁷ *See id.* § 158(d)(2)(A).

⁶⁸ *Id.* § 158(a).

⁶⁹ *Id.* § 158(a)(1).

⁷⁰ *Id.* § 158(a)(2). The justification for this provision is that an “undue extension” of exclusivity could unduly harm the interests of creditors by causing great and extensive delays. *See* H.R. REP. NO. 103-835, at 36 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3344–45.

⁷¹ *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 789 (2010).

because it is a “final” order.⁷² Alternatively, in some jurisdictions,⁷³ an appellant can take her appeal to a bankruptcy appellate panel (BAP).⁷⁴ A BAP is a panel composed of three bankruptcy judges from the circuit in which the district court sits who are authorized to hear appeals from the bankruptcy courts.⁷⁵ Thus, the role of the BAP while hearing appeals under the Code appears to be the same as the district court’s,⁷⁶ even if the precise authority of each court varies.⁷⁷

There are, however, a few key differences between a district court in its appellate role and the BAP panel. Unlike its treatment of appeals to the district court, the Code automatically funnels appeals to the BAP in circuits that have authorized them⁷⁸ unless either the appellant or another party to the suit chooses to be heard by the district court.⁷⁹ Furthermore, even in circuits that have adopted a BAP, an appellant cannot be heard by the panel if the district in which the appeal occurs does not permit appeals to the panel.⁸⁰ Much like the initial grant of “original and exclusive jurisdiction” over title 11 cases to the

⁷² See 1 COLLIER, *supra* note 27, ¶ 5.08[2]. The converse is not true, however: a party cannot immediately appeal an order denying confirmation of a plan because the party retains the ability to submit a new or modified plan. *Id.* ¶ 5.08[5]. An appellant can also seek appeals for other types of interlocutory orders, whether arising in the normal course of the proceedings or under 28 U.S.C. § 157; however, these appeals require the leave of the bankruptcy court to do so. See 28 U.S.C. § 158(a)(3).

⁷³ Bankruptcy Appellate Panels have been established by the First, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeals. 1 COLLIER, *supra* note 27, ¶ 5.02[3][b].

⁷⁴ 28 U.S.C. § 158(b). The Code requires each circuit to create a BAP unless a circuit determines that it has “insufficient judicial resources” or that creating the panel would result in “undue delay or increased cost” for parties in bankruptcy. *Id.* § 158(b)(1)(A)–(B). In an effort to circumvent these possible limitations, the Code allows two or more circuits to seek authorization by the Judicial Conference of the United States to establish a joint bankruptcy panel authorized to hear appeals from any constituent circuit. See *id.* § 158(b)(4).

⁷⁵ *Id.* § 158(b)(1).

⁷⁶ See *id.* § 158(c)(2) (“An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.”).

⁷⁷ See 8 NORTON, *supra* note 37, § 170:8, at 170-38.

⁷⁸ See 28 U.S.C. § 158(c)(1). This opt-out procedure—that is, presumed consent to BAP review—represents a change implemented by the 1994 Amendments; previously, an appeal by the then-Bankruptcy Appellate Panel Service “could be heard ‘upon consent’ of the parties” without addressing whether one could consent simply by not objecting. 8 NORTON, *supra* note 37, § 170:5, at 170-21.

⁷⁹ 28 U.S.C. § 158(c)(1)(A)–(B).

⁸⁰ *Id.* § 158(b)(6) (“Appeals may not be heard under this subsection by a panel of the [BAP] service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.”). This structure can lead to odd situations. For instance, the Sixth Circuit’s BAP is only authorized to hear appeals coming from “the Northern and Southern Districts of Ohio, the Western District of Michigan, the Western District of Tennessee, the Middle District of Tennessee and the Eastern District of Kentucky.” 1 COLLIER, *supra* note 27, ¶ 5.02[3][b].

district courts,⁸¹ this appellate structure reflects a congressional attempt to avoid the overly broad jurisdictional grants to Article I courts that the Supreme Court held unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁸²

Bankruptcy cases reach the United States Courts of Appeals in two ways. First, a court of appeals can accept an appeal directly from a bankruptcy court judgment.⁸³ Either the lower court, or the appellees and appellants collectively, must certify that the appealed issue falls into at least one of three categories: (1) the issue involves a question of law in which there is no controlling circuit or Supreme Court decision or involves a matter of public importance; (2) the issue is a question of law whose resolution requires choosing from conflicting decisions; or (3) an immediate appeal would advance the progress of the case or proceeding.⁸⁴ Second, a court of appeals may hear all appeals from district courts and BAPs.⁸⁵ In this situation, the court of appeals acts as the middle of the three-tiered appeals route, reviewing the judgments of the BAP or the district court⁸⁶ and being reviewable in turn by the Supreme Court.⁸⁷

C. Equitable Mootness: A Potent Doctrine of Prudential Power

Primarily found in bankruptcy appeals, the equitable mootness doctrine allows a reviewing court to avoid evaluating the appealed claim on its merits for equitable or prudential reasons.⁸⁸ An oddity in a body of law so heavily driven by statutory interpretation,⁸⁹ this doctrine is not defined by any specific Code provision but has instead grown out of the various circuits' accumulated case law regarding certain equitable notions underlying the Code.⁹⁰ At its

⁸¹ 28 U.S.C. § 1334(a). All district courts have been given the right to refer some or all bankruptcy claims to the bankruptcy judges in their district. *See id.* § 157(a); 1 COLLIER, *supra* note 27, ¶ 3.01[1].

⁸² *See* 1 COLLIER, *supra* note 27, ¶¶ 3.01[1], 5.02[3][a].

⁸³ 28 U.S.C. § 158(d)(2)(A).

⁸⁴ *Id.* § 158(d)(2)(A)(i)–(iii). Certification is made subject to the constraints of Rule 8001 of the Federal Rules of Bankruptcy Procedure. *See* FED. R. BANKR. P. 8001(f).

⁸⁵ *See* 28 U.S.C. § 158(d)(1).

⁸⁶ *See id.*

⁸⁷ *Id.* § 1254; 1 COLLIER, *supra* note 27, ¶ 5.01.

⁸⁸ *See, e.g.,* Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1337–38 (10th Cir. 2009).

⁸⁹ *See* Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Court: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1, 2 (2005) (“In other words, a bankruptcy judge’s powers stem virtually exclusively from statutes.”).

⁹⁰ *See In re* Cont’l Airlines, 91 F.3d 553, 558 n.1 (3d Cir. 1996) (en banc) (“Because the doctrine often called ‘equitable mootness’ is well accepted, there is little discussion in the case law of its historical basis.”). Then-Judge Alito, writing in dissent, offered a possible history, tracing the doctrine’s roots to the Ninth Circuit’s pre-Code decision in *In re Roberts Farms, Inc.* *See id.* at 569–70 (Alito, J., dissenting).

heart, equitable mootness reflects one of the fundamental policies of bankruptcy: finality. For bankruptcy relief to encourage “orderly reorganization and settlement of debtor estates,” courts should respect the finality of a confirmed plan and overturn it only for good reasons.⁹¹

1. *The Differences Between Equitable, Statutory, and Constitutional Mootness*

Most courts have taken great pains to distinguish equitable mootness from constitutional mootness and statutory mootness, the two other forms of mootness that arise in bankruptcy.⁹² Constitutional mootness, also known as jurisdictional mootness, arises when some change in circumstance has confounded the court’s ability “to grant ‘any effectual relief whatever’” during the appeal.⁹³ The threshold for constitutional mootness is set high; as long as the court “can fashion *some* form of meaningful relief, even if it only partially redresses the [appealing party’s] grievances,” the court has the authority to act.⁹⁴ Statutory mootness, on the other hand, arises from specific Code provisions directly limiting an appellate court’s ability to overturn certain postpetition financial transactions, specifically those involving sales or leases of property⁹⁵ or extensions of credit through debt, a lien, or priority to a debtor.⁹⁶ Unless a party can show that the creditor, buyer, or lessor did not transact in good faith, a “reversal or modification” of the transaction’s authorization on appeal will not invalidate the transaction itself.⁹⁷ In contrast, equitable mootness focuses less on whether a court can legally affect a change

⁹¹ See *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994); *Rochman v. Ne. Utils. Serv. Grp. (In re Pub. Serv. Co. of N.H.)*, 963 F.2d 469, 471–72 (1st Cir. 1992).

⁹² See *In re Cont’l Airlines*, 91 F.3d at 558 (differentiating narrow Article III discussion from “the broader interpretation of mootness applied in bankruptcy cases”). But see *Focus Media, Inc. v. NBC (In re Focus Media, Inc.)*, 378 F.3d 916, 922–23 (9th Cir. 2004) (“Bankruptcy appeals may become moot in one of two (somewhat overlapping) ways.”).

⁹³ *In re Cont’l Airlines*, 91 F.3d at 558 (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)); see also *In re Pub. Serv. Co. of N.H.*, 963 F.2d at 471 (“Jurisdictional concerns may arise from the constitutional limitations imposed on the exercise of Article III judicial power . . . where no effective remedy can be provided . . .”). Examples of constitutionally moot issues include appeals based on a law that has been repealed or an appeal involving a candidate in an election campaign controversy who had since withdrawn his candidacy. See *In re Cont’l Airlines*, 91 F.3d at 558.

⁹⁴ *In re Cont’l Airlines*, 91 F.3d at 558 (internal quotation marks omitted).

⁹⁵ 11 U.S.C. § 363(m) (2006). This “safe harbor” is not invalidated by knowledge of the appeal or the possibility of an appeal; however, if the sale or lease is stayed pending an appeal, a court can invalidate it. *Id.*

⁹⁶ *Id.* § 364(e).

⁹⁷ *Id.* §§ 363(m), 364(e). However, there is no precise definition of what constitutes good faith. See 3 COLLIER, *supra* note 27, ¶¶ 363.11, 364.06[1].

and more on whether doing so would inequitably disturb the “parties’ settled expectations and the ability of a debtor to emerge from bankruptcy.”⁹⁸

2. *Testing an Appealed Claim for Equitable Mootness*

To evaluate this “balancing of the equities” effectively, the circuits have crafted or adopted various tests to consider claims of equitable mootness.⁹⁹ Most courts apply a factor-based test that, with a certain amount of variation in wording and emphasis in the individual courts of appeals,¹⁰⁰ weighs each of the following:

- (1) [W]hether a stay has been obtained;
- (2) whether the plan has been substantially consummated;
- (3) whether the relief requested would affect the rights of parties not before the [c]ourt;
- (4) whether the relief requested would affect the success of the confirmed plan; and
- (5) the public policy of affording finality to bankruptcy court judgments.¹⁰¹

The precise form of this test varies among the circuits,¹⁰² with some courts omitting a factor,¹⁰³ collapsing two factors into one,¹⁰⁴ or adding an additional factor.¹⁰⁵ A few courts employ tests that vary considerably in their underlying construction. For instance, the Seventh Circuit uses a list of factors that are

⁹⁸ *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 947 (6th Cir. 2008); *see also In re UNR Indus., Inc.*, 20 F.3d 766, 769–70 (7th Cir. 1994) (“There is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome (‘equitable mootness’).”).

⁹⁹ For a comprehensive overview of these varying tests, *see generally* Rosiek, *supra* note 14.

¹⁰⁰ *See id.* at 697–99.

¹⁰¹ *Metro. Life Ins. Co. v. Milk Palace Dairy, LLC (In re Milk Palace Dairy, LLC)*, 327 B.R. 462, 468 (B.A.P. 10th Cir. 2005) (footnotes omitted), *quoted in* *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1338 (10th Cir. 2009).

¹⁰² Concerns about possible variations in outcomes arising from differing forms of equitable mootness have led some commentators to call for a unified application of the doctrine. *See generally* Rosiek, *supra* note 14.

¹⁰³ *See, e.g., In re United Producers, Inc.*, 526 F.3d at 947–48. Some courts have explicitly refused to consider the factor regarding the public policy in favor of affording finality to bankruptcy judgments. *See, e.g., id.* at 947 n.2. However, it has been noted that this consideration is actually the animating reason for the doctrine, and it is likely implicitly considered if not explicitly discussed. *See* Bruce H. White & William L. Medford, *Equitable Mootness and Substantial Consummation: Are You Losing Your Right to Your Appeal?*, AM. BANKR. INST. J., Feb. 2001, at 26, 26.

¹⁰⁴ *See, e.g., United States ex rel. FCC v. GWI PCS 1 Inc. (In re GWI PCS 1 Inc.)*, 230 F.3d 788, 800 (5th Cir. 2000) (collapsing two factors—the effect on third parties not before the court granting the requested relief or the effect on the success of the plan—into one factor).

¹⁰⁵ *See, e.g., In re Paige*, 584 F.3d at 1339 (adding the following factor: “(6) [B]ased upon a quick look at the merits of appellant’s challenge to the plan, is appellant’s challenge legally meritorious or equitably compelling?”).

similar to the factors articulated above in some regards,¹⁰⁶ but this list represents more of an ambiguous approach with “a set of loose guidelines, rather than a step-by-step test.”¹⁰⁷ Regardless of name or form, the equitable mootness doctrine has been implemented in all circuits.¹⁰⁸

A court generally grants equitable mootness in one of three situations. First, a court will invoke the doctrine when granting an appeal on the merits would completely dismantle a confirmed and implemented reorganization plan.¹⁰⁹ Second, it will similarly dismiss a case when granting the appeal “would knock the props out from under the authorization for every transaction that has taken place . . . [and] do nothing other than create an unmanageable, uncontrollable situation for the [b]ankruptcy [c]ourt.”¹¹⁰ Finally, courts will grant equitable mootness when the requested relief would substantially undercut the interests of third parties not before it.¹¹¹ When none of these three conditions are present, however, courts are more skeptical that the claim is equitably moot and much less likely to dismiss the appeal.¹¹²

¹⁰⁶ Other factors considered include the following: the underlying policy grounds of finality; the passage of time since the confirmation of the plan; whether the plan has been acted upon or substantially consummated; any substantial changes in circumstances; whether the appellants have sought a stay; the effect of granting relief on innocent third parties; and the impact of the relief on the debtor and third parties. *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1048 (7th Cir. 1993). Importantly, there is nothing in the court’s language to suggest that these are the only factors to consider, thus implying that this test is more pliable than other circuits’ tests. *Compare id.* (noting that an equitable mootness evaluation also involved weighing a “number of subsidiary elements,” and describing these lower elements with the inclusive word “including”), with *In re United Producers, Inc.*, 526 F.3d at 947 n.2 (refusing to consider factors not already in the test as adopted).

¹⁰⁷ Rosiek, *supra* note 14, at 702.

¹⁰⁸ See *In re Paige*, 584 F.3d at 1337–38 (10th Cir. 2009) (listing cases from every other circuit that adopted the doctrine when considering whether “equitable, prudential, or pragmatic considerations can render an appeal of a bankruptcy court decision moot even when the appeal is not constitutionally moot”) (internal quotation marks omitted).

¹⁰⁹ See, e.g., *In re United Producers, Inc.*, 526 F.3d at 950–51; *Rochman v. Ne. Utils. Serv. Grp.* (*In re Pub. Serv. Co. of N.H.*), 963 F.2d 469, 473–76 (1st Cir. 1992).

¹¹⁰ *Trone v. Roberts Farms, Inc.* (*In re Roberts Farms, Inc.*), 652 F.2d 793, 797 (9th Cir. 1981), *quoted in* *Frito-Lay, Inc. v. LTV Steel Co.* (*In re Chateaugay Corp.*), 10 F.3d 944, 953 (2d Cir. 1993).

¹¹¹ See, e.g., *Retired Pilots Ass’n of US Airways, Inc. v. US Airways Grp., Inc.* (*In re US Airways Grp., Inc.*), 369 F.3d 806, 810 (4th Cir. 2004) (granting the requested relief and reimposing a pension plan “would directly undermine the interests of those lenders that expressly conditioned their loans on resolution of this issue”).

¹¹² See *Hilal v. Williams* (*In re Hilal*), 534 F.3d 498, 500–01 (5th Cir. 2008) (professional compensation in chapter 11 plan); *United Artists Theatre Co. v. Walton* (*In re United Artists Theatre Co.*), 315 F.3d 217, 228 (3d Cir. 2003) (indemnity provision); *Clear Channel Outdoor, Inc. v. Knupfer* (*In re PW, LLC*), 391 B.R. 25, 33–35 (B.A.P. 9th Cir. 2008) (lien stripping).

3. *Criticism of the Equitable Mootness Doctrine*

Equitable mootness serves an important function by ensuring that appeals do not interfere with a debtor's chances of successfully reorganizing or cause unmanageable situations for bankruptcy courts.¹¹³ However, the doctrine is not without its critics. Judge Easterbrook of the Seventh Circuit, although accepting of the doctrine's underlying rationale in preserving reorganization efforts, took issue with the designation "equitable mootness."¹¹⁴ He believed using the term "mootness" to describe two different situations—both a court's "inability to alter the outcome" and its "unwillingness to alter the outcome"—"breeds confusion."¹¹⁵ Other commentators have criticized the doctrine more harshly. Then-Judge Alito of the Third Circuit, having addressed the doctrine in two different cases,¹¹⁶ believed that the doctrine as adopted could "easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans."¹¹⁷ Critics also view the doctrine as allowing Article III courts to shirk their duties by delegating too much of their inherent authority to the bankruptcy courts¹¹⁸ or allowing the courts to exercise judicially created powers in considerable excess of those explicitly granted by the Code.¹¹⁹

D. "All Appellate Gaul"¹²⁰: *The Standards of Review in Bankruptcy Appeals*

Having tracked the issue from plan confirmation through the first-level appellate determination of equitable mootness, this Comment now turns to the standards of review used by second-level appellate courts. Appellate courts have two duties that sometimes conflict: ensuring a coherent and clear body of precedent while also ensuring that the public can attach an appropriate level of certainty to a lower court's determinations.¹²¹ Standards of review are one of

¹¹³ See *In re Roberts Farms, Inc.*, 652 F.2d at 797.

¹¹⁴ *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994).

¹¹⁵ *Id.*

¹¹⁶ See *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 191–92 (3d Cir. 2001) (Alito, J., concurring); *In re Cont'l Airlines*, 91 F.3d 553, 567–73 (3d Cir. 1996) (en banc) (Alito, J., dissenting).

¹¹⁷ *In re Zenith Elecs. Corp.*, 258 F.3d at 192 (3d Cir. 2001) (Alito, J., concurring).

¹¹⁸ See Knight, *supra* note 14, at 280–81.

¹¹⁹ See *In re Cont'l Airlines*, 91 F.3d at 572 (Alito, J., dissenting); Murphy, *supra* note 14, at 46.

¹²⁰ See Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 173 (1978) ("All appellate Gaul . . . is divided into three parts: review of facts, review of law, and review of discretion.").

¹²¹ See Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. ILL. U. L.J. 73, 75–78 (2009).

the two primary ways that appellate courts carry out these duties, as they define which issues will receive more or less exacting review.¹²²

Implementing the correct standard of review for the given issue creates a number of benefits. An individual appellant will have notice and thus have a rough approximation of “how good” her claim will have to be to successfully appeal a given issue.¹²³ This benefit allows parties with weaker claims to avoid filing spurious appeals,¹²⁴ while allowing those with more meritorious cases to craft their argument appropriately.¹²⁵ Having an appropriate standard of review also helps to maintain a proper balance of power between the lower and higher courts and promote judicial economy by limiting the number of potential appeals.¹²⁶ However, these benefits are only possible if the “standard is understood [and applied] consistently among judges of the reviewing courts.”¹²⁷

Courts of appeal in bankruptcy matters generally apply three standards of review: (1) findings of fact by the trial court under the clearly erroneous standard; (2) findings of law by the trial court under the de novo standard; and (3) issues of discretion under the abuse of discretion standard.¹²⁸ The clearly erroneous standard requires that a reviewing court only overturn a trial court’s

¹²² See *id.* at 78–80. The other method concerns narrowing appellate jurisdiction. See *id.* at 78, 81–82.

¹²³ Peters, *supra* note 21, at 241–42. More eloquently stated, “Reading these standards of review is not merely a help to the court; they also indicate the decibel level at which the appellate advocate must play to catch the judicial ear.” Alvin B. Rubin, *The Admiralty Case on Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 873 (1983).

¹²⁴ Peters, *supra* note 21, at 241.

¹²⁵ *Id.* at 241–42.

¹²⁶ *Id.* at 238–42.

¹²⁷ Storm, *supra* note 121, at 89. There is a sense in the scholarship that, whether due to the admitted difficulties in precisely defining the standards or to a lack of interest, these standards are not as fully examined or understood as they should be. See, e.g., Peters, *supra* note 21, at 247 (“Often appellate judges ignore the standards of review, are confused by them, or cleverly manipulate them to achieve a specific result.”); Storm, *supra* note 121, at 78–79 (“[T]he standard of review is often viewed as an afterthought by many practitioners, as well as by some appellate court judges.”); Kelly Kunsch, *Standard of Review (State & Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 12 (1994) (noting that standards of review have been “virtually ignored by legal scholars,” while courts either ignore the standard outright, state the appropriate standard and then ignore it, invoke the standard “talismanically to authenticate” their opinions, or characterize the appropriate standard for an issue in a manner that is ultimately outcome determinative).

¹²⁸ See, e.g., Michel v. Federated Dep’t Stores, Inc. (*In re Federated Dep’t Stores, Inc.*), 44 F.3d 1310, 1315 (6th Cir. 1995). Although these issues are not described in universally applicable language, “the scope of actual disagreement is narrow.” Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400 (1990). Moreover, a fourth standard—the “substantial evidence” standard—is used to review jury fact-finding. See Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 286 (2002). It will not be discussed further here.

finding of fact when no evidence exists to support the contention or, “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”¹²⁹ Both first-level and second-level appellate courts are required to extend this deference to the bankruptcy court’s findings of fact.¹³⁰ Questions of law, on the other hand, are reviewed de novo by both the first and second appellate levels;¹³¹ this means that the reviewing court owes no deference to the lower court’s determination. In bankruptcy proceedings involving core matters, such as plan confirmation,¹³² this results in the second-level appellate court effectively providing de novo review to the determinations of the first-level appellate court.¹³³

Reviewing a determination for an abuse of discretion is perhaps the most difficult standard to apply appropriately.¹³⁴ The abuse of discretion standard is used to review discretionary rulings,¹³⁵ which most frequently involve procedural issues concerning the smooth running and supervision of a court.¹³⁶ This standard is widely viewed as the most deferential of the three standards discussed here.¹³⁷ However, differing definitions for an abuse of discretion

¹²⁹ United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

¹³⁰ See Tech. Lending Partners LLC v. San Patricio Cnty. Cmty. Action Agency (*In re San Patricio Cnty. Cmty. Action Agency*), 575 F.3d 553, 557 (5th Cir. 2009) (noting that when reviewing an appeal from the lower court, courts of appeal “apply the same standard of review to the bankruptcy court’s ruling as did the district court”); see also FED. R. BANKR. P. 8013 (“Findings of fact, whether based on oral or documentary evidence, shall not be set aside [by a district court or BAP] unless clearly erroneous . . .”).

¹³¹ Crowell v. Theodore Bender Accounting, Inc. (*In re Crowell*), 138 F.3d 1031, 1033 (5th Cir. 1998).

¹³² 28 U.S.C. § 157(b)(2)(L) (2006).

¹³³ See Precision Steel Shearing, Inc., v. Fremont Fin. Corp. (*In re Visual Indus., Inc.*), 57 F.3d 321, 324 (3rd Cir. 1995) (“Because the district court sits as an appellate court in bankruptcy cases, our review of the district court’s decision is plenary.”). However, “[w]hen the district court has acted as a trial court, and [28 U.S.C. §] 158(d) does not apply, the normal appellate procedures found in title 28 will apply[,]” and the court of appeals will apply the “clearly erroneous” standard of review to the district court’s findings of fact. See 1 COLLIER, *supra* note 27, ¶ 5.1.1; see also FED. R. CIV. P. 52(a)(6) (requiring that the court of appeals accept a district court’s findings of fact unless clearly erroneous).

¹³⁴ See Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 245 (1991) (“While concepts of fact and law can be grasped intuitively, although imperfectly, the concept of discretion does not provide us with as convenient a handle.”).

¹³⁵ See generally Rosenberg, *supra* note 120, at 172–81.

¹³⁶ See Storm, *supra* note 121, at 88–89. However, there are some substantive issues—such as child custody or criminal sentencing—left to the discretion of the lower court. Rosenberg, *supra* note 120, at 173.

¹³⁷ See, e.g., Peters, *supra* note 21, at 243 (noting that abuse of discretion is “the [standard] most deferential to trial court decisions”). Under *de novo* review, the trial court’s determination is protected by a “gossamer film,” while abuse of discretion serves to “safeguard[] [the trial court’s decision] by a Kevlar shield.” See, e.g., *id.* at 246 (internal quotation marks omitted) (quoting Francis M. Allegra, *Section 482: Mapping the Contours of the Abuse of Discretion Standard of Judicial Review*, 13 VA. TAX REV. 423, 473 (1994)).

allow for varying amounts of deference given the trial court. As Judge Friendly reflected,

There are a half dozen different definitions of “abuse of discretion,” ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.¹³⁸

A brief comparison will demonstrate this variation. One leading legal dictionary defines an “abuse of discretion” as “[a]n appellate court’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.”¹³⁹ Using this definition, it would appear virtually impossible to overcome a determination that is reviewed under an abuse of discretion standard. However, other courts have defined an “abuse of discretion” much more anemically: “[W]hen judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.”¹⁴⁰ Thus, it is clear that where the decision involves a discretionary doctrine, a review for abuse of discretion can vary considerably in the amount of deference it will offer a lower court.

II. A TALE OF TWO STANDARDS: *IN RE PAIGE*’S ADOPTION OF THE ABUSE OF DISCRETION STANDARD AND THE WIDENING CIRCUIT SPLIT

A. *In re Paige*’s Adoption of the Abuse of Discretion Standard

The most recent instance of a court of appeals reviewing equitable mootness for an abuse of discretion in binding precedent is the Tenth Circuit’s decision in *In re Paige*.¹⁴¹ Two parties, Search Market Direct, Inc. (SMDI) and ConsumerInfo.com (ConsumerInfo), sought to take possession of the domain name “FreeCreditScore.com” from the liquidating debtor, Steve Zimmer Paige.¹⁴² To this end, both SMDI and ConsumerInfo filed competing plans for

¹³⁸ Friendly, *supra* note 22, at 763.

¹³⁹ BLACK’S LAW DICTIONARY 11 (9th ed. 2009).

¹⁴⁰ *In re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954), *quoted in* Friendly, *supra* note 22, at 764.

¹⁴¹ See *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1334–36 (10th Cir. 2009). Prior to that, the most recent decision was from the Sixth Circuit in 2008. See *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 946–47 (6th Cir. 2008).

¹⁴² See *In re Paige*, No. 05-34474, 2007 WL 4143212, at *7 (Bankr. D. Utah Nov. 13, 2007), *aff’d sub nom.* *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 439 B.R. 786 (D. Utah 2010).

liquidation in chapter 11.¹⁴³ At the confirmation hearing, the Bankruptcy Court for the District of Utah held that SMDI's plan did not meet the requirements of § 1129(a)(1), (a)(3), or (a)(11), and refused to confirm it.¹⁴⁴ ConsumerInfo's joint plan did not have these deficiencies and was confirmed on October 15, 2007.¹⁴⁵

SMDI appealed to the U.S. District Court for the District of Utah, alleging that several of the bankruptcy judge's findings of fact regarding the confirmed plan were in error and seeking to substitute its rejected plan for the confirmed plan.¹⁴⁶ In opposition, ConsumerInfo and the chapter 11 trustee asserted that SMDI's claims were both constitutionally and equitably moot and should be dismissed.¹⁴⁷ Judge Stewart dismissed the appeal on both grounds.¹⁴⁸ First, he found the case constitutionally moot because reversal would entail disgorging payments from many parties unrelated to the suit and over whom the court did not have power; therefore, it would be "impossible for the court to grant any effectual relief whatever."¹⁴⁹ Furthermore, the court examined the factual record after confirmation.¹⁵⁰ Although noting that SMDI tried and failed to obtain a stay pending appeal,¹⁵¹ the court found the appeal equitably moot because the plan had been substantially consummated when all of the required payments had been distributed.¹⁵² Moreover, the court believed that granting the desired relief would have significant detrimental effects on third party interests, the success of the plan, and the public policy favoring finality in bankruptcy.¹⁵³

SMDI then appealed to the Tenth Circuit, which reversed the lower court on both grounds.¹⁵⁴ Addressing the issue of constitutional mootness first, the court noted that it traditionally reviewed such claims *de novo* and reversed because ConsumerInfo had not demonstrated conclusively that both of the

¹⁴³ *Id.* at *6.

¹⁴⁴ *Id.* at *10, *14, *20–21.

¹⁴⁵ *Id.* at *8, *14, *20–21.

¹⁴⁶ *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, No. 2:07-CV-822 TS, 2008 WL 2064628, at *1–2 (D. Utah May 13, 2008), *rev'd*, 584 F.3d 1327.

¹⁴⁷ *See id.* at *2.

¹⁴⁸ *Id.* at *4–5.

¹⁴⁹ *Id.* at *4 (internal quotation marks omitted).

¹⁵⁰ *See id.* at *3–4.

¹⁵¹ *Id.* at *5.

¹⁵² *Id.* at *7.

¹⁵³ *Id.* at *5–7.

¹⁵⁴ *See Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1348–49 (10th Cir. 2009).

requested forms of relief were simply impossible to grant.¹⁵⁵ Turning to equitable mootness, the court addressed which standard of review it should apply.¹⁵⁶ Noting a split between the circuits,¹⁵⁷ the court honed in on the heart of the disagreement: other doctrines that were discretionary or equitable in nature received deference, but plenary reviews of a decision by a first-level appellate court were the norm in bankruptcy cases.¹⁵⁸ Comparing the equitable mootness doctrine to prudential mootness,¹⁵⁹ the court noted that both doctrines were discretionary responses used when the court had authority to fashion a remedy for a live controversy and ultimately refused to do so due to concerns regarding the effect on outside parties.¹⁶⁰ Having previously ascribed abuse of discretion review to determinations of prudential mootness,¹⁶¹ the court extended the same deferential standard to the lower court's determination of equitable mootness.¹⁶² However, notwithstanding its adoption of this supposedly highly deferential review, the court of appeals reversed the lower court and remanded for an ultimate determination on the merits.¹⁶³

B. Lay of the Land: Equitable Mootness Review in Federal Courts

Only four circuits have definitively addressed which standard of review should be applied to equitable mootness determinations. The Fifth and Sixth Circuits review the determinations *de novo*¹⁶⁴ while the Third and Tenth Circuits favor deference, reviewing these determinations for abuse of

¹⁵⁵ *Id.* at 1336–37 (stating that ConsumerInfo had not proven that SMDI did not have the funds necessary to fulfill its plan and, even if it had, the court could grant at least part of the requested relief by reversing the confirmation of ConsumerInfo's plan).

¹⁵⁶ *Id.* at 1334–36.

¹⁵⁷ *Id.* at 1334–35.

¹⁵⁸ *Id.* at 1335.

¹⁵⁹ Prudential mootness arises when a court has proper jurisdiction under Article III, but for reasons related to “prudence and comity for coordinate branches of government,” the court exercises its discretion in refusing to grant relief. *See S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727–28 (10th Cir. 1997) (quoting *Chamber of Commerce v. U.S. Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980)) (internal quotation marks omitted), *cited in In re Paige*, 584 F.3d at 1335 n.7.

¹⁶⁰ *In re Paige*, 584 F.3d at 1335 n.7.

¹⁶¹ *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997), *cited in In re Paige*, 584 F.3d at 1335.

¹⁶² *In re Paige*, 584 F.3d at 1335.

¹⁶³ *Id.* at 1340–49 (finding that, despite the substantial confirmation of the plan and SMDI's failure to seek a stay during the appeal, ConsumerInfo had failed to carry its burden because it did not prove conclusively the other equitable mootness factors favored dismissal of the appeal). Ultimately, the district court affirmed the bankruptcy court's confirmation of ConsumerInfo's plan. *See Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 439 B.R. 786, 801 (D. Utah 2010).

¹⁶⁴ *See Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 947 (6th Cir. 2008); *United States ex rel. FCC v. GWI PCS 1 Inc. (In re GWI PCS 1 Inc.)*, 230 F.3d 788, 799–800 (5th Cir. 2000).

discretion.¹⁶⁵ The rest of the circuits have yet to explicitly address the issue,¹⁶⁶ have only explicitly considered the issue in nonbinding unpublished opinions,¹⁶⁷ or have not considered the issue at all.¹⁶⁸ Additionally, vagueness in opinions as to the specific type of mootness being addressed has caused some courts of appeals to believe mistakenly that other circuits have adopted one standard or another.¹⁶⁹

The courts have rarely expounded their reasons for adopting a specific standard.¹⁷⁰ Even then-Judge Alito relegated the portion of his dissent opposing the adoption of abuse of discretion standard of review to a mere footnote.¹⁷¹ Most courts have based their ultimate decision on no more than one of the following factors:¹⁷² the equitable and prudential components of the doctrine;¹⁷³ the structural relationship of the district court and the BAPs with the circuit court in bankruptcy appeals;¹⁷⁴ whether a particular judicial officer was in a better position to evaluate the arguments;¹⁷⁵ how doctrines considered structurally similar had previously been handled in the circuit;¹⁷⁶ and any

¹⁶⁵ See *In re Paige*, 584 F.3d at 1334–35; *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc).

¹⁶⁶ See *Retired Pilots Ass'n of US Airways, Inc. v. US Airways Grp., Inc.* (*In re US Airways Grp., Inc.*), 369 F.3d 806, 809 n.* (4th Cir. 2004) (refusing to consider the issue since it did not affect the outcome in that case).

¹⁶⁷ See *Zeeger v. President Casinos, Inc.* (*In re President Casinos, Inc.*), 409 F. App'x 31, 31–32 (8th Cir. 2010) (per curiam) (reviewing de novo); *Olympic Coast Inv., Inc. v. Crum* (*In re Wright*), 329 F. App'x 137, 137 (9th Cir. 2009) (relying on a case blending constitutional and equitable mootness to justify reviewing de novo); *Ad Hoc Comm. of Kenton Cnty. Bondholders v. Delta Air Lines, Inc.*, 309 F. App'x 455, 457 (2d Cir. 2009) (reviewing for abuse of discretion); *Liquidity Solutions, Inc. v. Winn-Dixie Stores, Inc.* (*In re Winn-Dixie Store, Inc.*), 286 F. App'x 619, 622 & n.2 (11th Cir. 2008) (per curiam) (reviewing de novo).

¹⁶⁸ For instance, the D.C. Circuit Court of Appeals has yet to consider the issue at the time of writing.

¹⁶⁹ The Fifth Circuit, in adopting de novo review, suggested that other circuits, including the Tenth Circuit, had already adopted this standard. *In re GWI PCS 1 Inc.*, 230 F.3d at 800 n.23. However, with regards to the Tenth Circuit, this is clearly not the case. See *In re Paige*, 584 F.3d at 1334–35.

¹⁷⁰ See, e.g., *In re GWI PCS 1 Inc.*, 230 F.3d at 799–800.

¹⁷¹ See *In re Cont'l Airlines*, 91 F.3d 553, 568 n.4 (3d Cir. 1996) (en banc) (Alito, J., dissenting).

¹⁷² See, e.g., *In re GWI PCS 1 Inc.*, 230 F.3d at 799–800. *Contra In re Paige*, 584 F.3d at 1335–36 (considering several of the factors, though ultimately privileging one—the discretionary nature of the doctrine—over others).

¹⁷³ See *In re Cont'l Airlines*, 91 F.3d at 560.

¹⁷⁴ See *id.* at 568 n.4 (Alito, J., dissenting) (arguing that, because the district court in bankruptcy is also an appellate court, circuit court review of their decisions is plenary); see also *Curreys of Neb., Inc. v. United Producers, Inc.* (*In re United Producers, Inc.*), 526 F.3d 942, 946–47 (6th Cir. 2008); *In re GWI PCS 1 Inc.*, 230 F.3d at 799–800.

¹⁷⁵ See *In re United Producers, Inc.*, 526 F.3d at 952–53 (Kennedy, J., concurring in judgment) (stating that because the evaluation of equitable mootness by a BAP or district court is not a review, but rather an initial determination, deference may be due).

¹⁷⁶ See *In re Paige*, 584 F.3d at 1334–36 (seeing similarities between the doctrines of prudential mootness and equitable mootness).

possible value from the expertise available if the first-level appellate review had been held before a BAP.¹⁷⁷ These arguments also follow two distinct lines of reasoning. Following the lead of then-Judge Alito's dissent in *In re Continental Airlines*, courts that have adopted de novo review emphasize that appellate courts in bankruptcy normally give no deference to a lower appellate court,¹⁷⁸ while courts adopting abuse of discretion privilege the doctrine's discretionary and equitable characteristics.¹⁷⁹

III. A THEORETICAL FRAMEWORK FOR EVALUATING STANDARD OF REVIEW QUESTIONS

Determining the proper standard of review is not always a cut-and-dried issue. As Justice Scalia noted, "For most [doctrines], the answer is provided by a long history of appellate practice."¹⁸⁰ Elsewhere, the statutory language provides a clear indication of the intended standard of review.¹⁸¹ However, when both a clear history of appellate practice and statutory guidance are absent, "it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer."¹⁸² This issue is further complicated because courts tend to read discretion into statutory language that does not explicitly authorize it¹⁸³ and, therefore, the language and formulation of the rule are not always by themselves determinative.¹⁸⁴ However, since equitable mootness is a judicially created defense,¹⁸⁵ courts cannot rely on statutory interpretation to help answer the present question.

¹⁷⁷ *In re United Producers, Inc.*, 526 F.3d at 953 n.1 (Kennedy, J., concurring in judgment).

¹⁷⁸ *See, e.g., In re GWI PCS 1 Inc.*, 230 F.3d at 799–800.

¹⁷⁹ *See, e.g., In re Cont'l Airlines*, 91 F.3d at 560.

¹⁸⁰ *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

¹⁸¹ *See id.* (noting that 42 U.S.C. § 1988 allows that a court, "*in its discretion*," may allow the prevailing party . . . a reasonable attorney's fee" (alteration in original) (emphasis added)).

¹⁸² *Id.* at 558–59 (citing Rosenberg, *supra* note 22, at 638).

¹⁸³ *See* Rosenberg, *supra* note 22, at 655–57 (noting that, although the term "discretion" only appeared in ten of eighty-six Federal Rules of Civil Procedure, appellate courts had read discretion into thirty additional provisions). Similarly, courts of appeals have viewed phrases like "'the court may' order, decree, compel, or require," or take actions "for good cause," "in the interest of justice," or "to avoid delay or prejudice" as inherently limiting their ability to overturn a lower court's determination. *Id.* at 655. Finally, Professor Rosenberg notes that, although the word "may" could suggest deferential review, some bodies of law use the word often enough that one should be skeptical the drafters meant discretion to be used so frequently. *See id.*

¹⁸⁴ *See Pierce*, 487 U.S. at 559 (noting that the statutory language awarding attorney's fees unless certain conditions were met would allow, but did not compel, that the appellate courts grant the finding deference).

¹⁸⁵ *See* Parkins et al., *supra* note 12, at 40.

To address this issue, this Comment relies on both Supreme Court precedent and scholarship to examine when deference is due and, if so, how much. The Supreme Court has provided some guidance on when deference is due to a lower court's judgment.¹⁸⁶ Although none of these opinions arose in the bankruptcy context and were each primarily concerned with determining the proper standard when the statute was ambiguous or silent,¹⁸⁷ many portions of the analysis remain useful to assessing whether deference is due to a determination of equitable mootness.

A. *The Guiding Hand of Supreme Court Precedent: Pierce v. Underwood, Cooter & Gell v. Hartmarx Corp., and Koon v. United States*

The Supreme Court has offered significant guidance on distinguishing between de novo and discretionary review in a handful of decisions. The first and arguably most influential occurred in *Pierce v. Underwood*.¹⁸⁸ There, the plaintiffs invoked the recently enacted Equal Access to Justice Act (EAJA) to seek attorney's fees from the Secretary of Housing and Urban Development following a settlement.¹⁸⁹ The law allowed a nonfederal party in a suit against the United States to recover fees "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."¹⁹⁰ The district court found for the plaintiffs,¹⁹¹ and the Ninth Circuit, reviewing the lower court's decision for abuse of discretion,¹⁹² affirmed the award of attorney's fees.¹⁹³

In the course of examining the underlying legal doctrine, the Court eschewed any attempt to create a rigid formula for determining the proper standard of review for "substantially justified" determinations.¹⁹⁴ Instead, it

¹⁸⁶ See *Koon v. United States*, 518 U.S. 81, 98–100 (1996), *superseded in part by statute*, Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, 117 Stat. 650; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399–405 (1990); *Pierce*, 487 U.S. at 558–63.

¹⁸⁷ See *Koon*, 518 U.S. at 92–101 (reviewing the Sentencing Reform Act of 1984); *Cooter & Gell*, 496 U.S. at 399–405 (reviewing Rule 11 sanctions); *Pierce*, 487 U.S. at 558–63 (reviewing the Equal Access to Justice Act).

¹⁸⁸ *Pierce*, 487 U.S. 552.

¹⁸⁹ *Id.* at 556–57.

¹⁹⁰ 28 U.S.C. § 2412(d)(1)(A) (1988), *quoted in Pierce*, 487 U.S. at 556.

¹⁹¹ *Underwood v. Pierce*, 547 F. Supp. 256, 263–64 (C.D. Cal. 1982), *aff'd in part, rev'd in part*, 761 F.2d 1342 (9th Cir. 1985), *aff'd in part, vacated in part*, 487 U.S. 552 (1988).

¹⁹² *Underwood v. Pierce*, 761 F.2d 1342, 1346 (9th Cir. 1985), *aff'd in part, vacated in part*, 487 U.S. 552 (1988).

¹⁹³ *Id.* at 1348. However, the court rejected the trial court's specific calculation of the fees, lowering the respondents' award significantly. See *id.* at 1347–48.

¹⁹⁴ *Pierce*, 487 U.S. at 559.

focused on what it considered the most salient factors compelling review for an abuse of discretion.¹⁹⁵ First, it analyzed both the language and the structure of the statute,¹⁹⁶ reading the phrase “unless the court finds” as suggesting an inference of deference by focusing on the determination as the *lower court’s* to make.¹⁹⁷ Second, the Court considered how similarly structured aspects from the same law¹⁹⁸ could, by analogy, offer insights into the proper distributions of authority.¹⁹⁹ Third, it evaluated which judicial actor was better positioned, “as a matter of the sound administration of justice,” to decide the specific issue.²⁰⁰ In this regard, the Court considered it relevant that the district court’s “substantially justified” determination could hinge upon unreviewable aspects of the factual record.²⁰¹ Additionally, it noted that de novo review would waste considerable judicial resources because it would require the reviewing court to completely reexamine the factual record to appraise whether the government had sufficient grounds for the suit.²⁰² Fourth, the Court considered the impracticability of formulating a rule for the matter in the issue.²⁰³ The Court was reluctant to “fix or sanction narrow guidelines” to the district courts since “the number of possible situations [was] large,” and the Court viewed the flexibility offered by abuse-of-discretion as necessary to develop the doctrine further.²⁰⁴ Fifth, the Court considered the extent of liability suffered by the

¹⁹⁵ 1 CHILDRESS & DAVIS, *supra* note 19, § 4.01[2].

¹⁹⁶ See 28 U.S.C. § 2412(d)(1)(A) (1988).

¹⁹⁷ *Pierce*, 487 U.S. at 559 (internal quotation marks omitted).

¹⁹⁸ As quoted by the Court, the relevant portions provide that “an administrative agency . . . award attorney’s fees to a litigant prevailing in an agency adjudication if the Government’s position is not ‘substantially justified,’ and specifies that the agency’s decision may be reversed only if a reviewing court ‘finds that the failure to make an award . . . was unsupported by substantial evidence.’” *Id.* (quoting 5 U.S.C. § 504(a)(1), (c)(2) (1988)).

¹⁹⁹ *Id.* (believing it unlikely that the appellate court would give more deference to an agency’s determination regarding the strength of their own position than it would a similar determination by a district court).

²⁰⁰ *Id.* at 559–60 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Being “better positioned” deals fundamentally with the idea that one body in a multi-tiered judicial system has advantages over another in evaluating the various components of a case. Courts of appeals are arguably “better positioned” on questions of law because they address similar issues more frequently, can implement a uniform system more broadly, and have multiple minds addressing a handful of problems rather than having to concern themselves with supervising the trial. Trial courts, on the other hand, are “better positioned” for issues related to factual determinations and fact-finding due to their extensive familiarity with the specific case. *Friendly*, *supra* note 22, at 756–62.

²⁰¹ *Pierce*, 487 U.S. at 560 (noting that “the district court may have insights not conveyed by the record” due to their considerable familiarity with the parties, the evidence, and pretrial activity).

²⁰² *Id.* at 560–61.

²⁰³ *Id.* at 561–62.

²⁰⁴ *Id.* (internal quotation marks omitted) (analogizing its past discussion of Rule 54(b) discretionary certification to interpretations of the “substantially justified” rule). Neither the Court, Professor Rosenberg (on

adversely affected party to be proportional to the amount of review usually necessary.²⁰⁵ Although finding that the substantial amount of money due by the government in the instant case necessitate a more exacting review,²⁰⁶ the normal amount of such awards was much more modest and thus did not necessitate a higher level of scrutiny.²⁰⁷ Viewing the situation through these factors,²⁰⁸ “the text of the statute . . . and sound judicial administration” compelled the Court to hold that deferential review was proper.²⁰⁹

Dissenting, Justice White believed that the default rule favoring de novo review should take priority because the statute was “wholly silent” as to the standard of review.²¹⁰ Additionally, such deference to the lower court’s determination, he felt, conflicted with judicial values like “consistency and predictability in [the outcome of] EAJA litigation.”²¹¹ Finally, he noted that a “near unanimity” of the courts of appeals agreed that de novo review was more appropriate in these cases.²¹² Applying this less deferential standard, Justice White argued that the lower court’s holding was mistaken and should be reversed.²¹³

Addressing a similar issue two years later, the Court in *Cooter & Gell v. Hartmarx Corp.* examined the proper standard of review during an extensive

whom the Court relied considerably), or Judge Friendly addresses what occurs when a rule that once eluded generalization, but has since found expression, is finally expressed. Does it automatically become a rule of law subject to de novo review? Or are there situations where the creation of the rule or factor-based tests instead constitutes a limitation, but not wholesale revocation, of the court’s discretion in its application? *See id.*; Friendly, *supra* note 22, at 762–73; Rosenberg, *supra* note 120, at 179–82.

²⁰⁵ *Pierce*, 487 U.S. at 563.

²⁰⁶ The district court had ordered the government to pay attorney’s fees in the amount of \$1,129,450. *Id.* at 557.

²⁰⁷ *Id.* at 563 (noting that the median fee in these cases was less than \$3,000).

²⁰⁸ Nothing in the Court’s language suggests that these factors are necessarily exclusive; in fact, the opposite conclusion is the more reasonable inference. *See id.* at 559 (“No more today than in the past shall we attempt to discern or to create a comprehensive test; but we are persuaded that significant relevant factors call for an ‘abuse of discretion’ standard in the present case.”). One last significant factor that the Court did not consider explicitly, but may have implicitly considered, was whether the doctrine seems on its face to be discretionary: “i.e., does it smack of judgment, choice, sensitivity, and presence, or is it instead somewhat informed by broader concepts that seem legal?” *See* 1 CHILDRESS & DAVIS, *supra* note 19, § 4.01[2].

²⁰⁹ *Pierce*, 487 U.S. at 563.

²¹⁰ *Id.* at 583–85 (White, J., concurring in part and dissenting in part).

²¹¹ *Id.* at 585. Because a reviewing court would uphold a district court’s position as long as it was somewhat defensible, “[t]he availability of attorney’s fees would not only be difficult to predict but would vary from circuit to circuit or even within a particular circuit.” *Id.*

²¹² *Id.* at 586.

²¹³ *See id.* at 586–88.

examination of Rule 11 sanctions.²¹⁴ In this situation, all circuits agreed that a level of deference was appropriate but differed considerably on whether the abuse of discretion applied to only a portion of the rule or to its entirety.²¹⁵ In requiring that appellate courts consider all aspects of the rule under the abuse of discretion standard,²¹⁶ the Court addressed several points pertinent to subsequent standard of review issues. It viewed the fact-specific nature of Rule 11 violations as favorable grounds for adopting abuse of discretion review of all aspects of the decision.²¹⁷ Indeed, variation in application of the rule is inevitable because “[f]act-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.”²¹⁸ However, an abuse of discretion exists when such a “fact-bound” resolution is predicated on either a clearly erroneous factual record or a purely legal error.²¹⁹ In so holding, the Court reiterated the validity of the *Pierce* factors in analyzing the proper standard of review,²²⁰ adding to these an evaluation of the policy goals in Rule 11 that would be furthered by applying the abuse of discretion standard.²²¹

Finally, in *Koon v. United States*, the Court held that appellate review of a district court’s decision to deviate from the ranges in the United States Sentencing Commission Guidelines in unusual cases should be considered under an abuse of discretion standard.²²² Applying the factors developed in *Pierce v. Underwood* and *Cooter & Gell v. Hartmarx Corp.*, the Court clarified its application further. In dicta, Justice Kennedy considered that “[t]he deference that [was] due” might not exist in specific situations where the

²¹⁴ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399–405 (1990).

²¹⁵ Most of the circuits reviewed all issues involved in examining a Rule 11 violation for abuse of discretion, while the Ninth Circuit employed a mixed review that looked at the existence of a Rule 11 violation de novo, the underlying historical facts under the clearly erroneous standard, and the sanction implemented for abuse of discretion. *See id.* at 399–400.

²¹⁶ *Id.* at 405.

²¹⁷ *Id.* at 401–02. The Court considered that such fact-specific examinations must include “all the circumstances of a case.” *Id.* at 401. Therefore, “[a]n inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a few days before the statute of limitations runs.” *Id.* at 401–02.

²¹⁸ *Id.* at 405 (quoting *Mars Steel Corp. v. Cont’l Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989) (en banc)) (internal quotation marks omitted).

²¹⁹ *Id.* at 401–02. An example of a purely legal error would include a misunderstanding of Rule 11’s scope or reliance on an incorrect view of the law. *See id.*

²²⁰ The Court specifically noted the superior position of the district court in the determination and the extensive range and possible uniqueness of facts entering the court’s calculus. *See id.* at 403–04 (citing *Pierce v. Underwood*, 487 U.S. 552, 559–62 (1988)).

²²¹ *Id.* at 404.

²²² *Koon v. United States*, 518 U.S. 81, 91 (1996), *superseded in part by statute*, Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

appeal centered around a merely “mathematical error” in applying the Guidelines.²²³ In such situations, there is no functional difference in the positions of the two courts; both are equally able to apply the articulated formulas.²²⁴ Furthermore, *Koon* makes clear that, while a court’s application of fact-specific legal standards might deserve deference,²²⁵ the underlying legal components do not: “A district court by definition abuses its discretion when it makes an error of law.”²²⁶ As review of the underlying law is done without deference, it “might as well be called *de novo*.”²²⁷

B. Determining the Proper Degree of Discretion

This precedent provides a framework for evaluating when deference would be due to a lower court. However, once a court knows that abuse of discretion is the proper standard of review for a doctrine, the court must also determine the applicable threshold for defining when an abuse of discretion has actually occurred.²²⁸ As noted previously,²²⁹ this standard is not a single standard but rather a spectrum ranging from virtually unreviewable decisions to discretion almost indistinguishable from *de novo* review.²³⁰ Courts apply completely different versions of the abuse of discretion standard for different issues and, sometimes, when evaluating alternate outcomes of the same issue.²³¹ In this regard, Supreme Court precedent is less useful, as the Court has not yet

²²³ *Id.* at 98.

²²⁴ *Id.* Compare this with the situation at hand in *Koon*: to justify departing from the Guidelines, the trial judge had to find the facts unusual enough to merit the consideration, consider the facts against the factors the Guidelines set out for when a deviation is warranted, and assess the case’s “‘ordinariness’ or ‘unusualness’” in light of their considerable experience in handling sentencing matters. *See id.* at 98–99.

²²⁵ *See id.*

²²⁶ *Id.* at 100. However, this does not mean that “parts of the review must be labeled *de novo* while other parts are labeled an abuse of discretion,” but rather that “[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.” *Id.*

²²⁷ 1 CHILDRESS & DAVIS, *supra* note 19, § 4.01[2].

²²⁸ *See id.* § 4.01[3] (noting that there is “no such thing as *one* abuse of discretion standard”).

²²⁹ *See supra* text accompanying notes 137–40.

²³⁰ *See* Rosenberg, *supra* note 22, at 650–53; *see also* Friendly, *supra* note 22, at 763–64.

²³¹ In the civil context, for instance, it cannot be seriously claimed that the same abuse of discretion standard is used when a judge refuses to award attorney fees to a prevailing civil rights plaintiff as when she grants a one-day continuance. Even a seemingly single issue, such as the motion for new trial, may get different deference under “the” abuse of discretion standard depending on the basis for new trial argued, or whether it was granted or denied.

1 CHILDRESS & DAVIS, *supra* note 19, § 4.01[3] (footnotes omitted).

explicitly addressed or offered much guidance on determining how much deference is due once deferential review is granted to the individual issue.²³²

The critical aspect that requires appraisal is defining the range of discretion in which a lower court *could* permissibly operate. Conducting one of the first investigations of the topic, Professor Maurice Rosenberg viewed discretion as capturing a concept of judicial “choice”—that is, the lower court’s “limited right to be wrong” before a higher court on review will reverse the decision²³³—and defined four general categories within the abuse of discretion standard to help illustrate these degrees.²³⁴ Grade A discretion is “virtually impervious to appellate overturn—it is unreviewable and unreversible [sic]” because the trial court is given virtually unfettered authority; examples include a trial court’s refusal to submit special verdicts to a jury or whether to order pretrial conferences.²³⁵ At the other extreme, Grade D discretion is significantly less deferential and much closer to de novo review than Grade A discretion.²³⁶ Grades B and C discretion lie somewhere in between these two extremes; both involve a balancing of the degree to which the judge’s proximity to the factors informs her judgment²³⁷ and the degree of harm in a “more than ‘ordinarily’ wrong” judicial decision.²³⁸

Later commentators deviated in conceptualizing and articulating how this standard functioned. They viewed these degrees within appellate review of discretion less categorically, instead seeing the process more as a continuum

²³² But cf. *id.* (suggesting an application of the *Pierce* factors to guide the decision to apply the abuse of discretion standard to the specific issue).

²³³ Rosenberg, *supra* note 120, at 175–76. Professor Rosenberg viewed discretion as having two components. First, a court has discretion “when there are no fixed principles by which its correctness may be determined” (primary or “decision-liberating” discretion). *Id.* at 175 (internal quotation marks omitted). Second, “secondary,” or “review-limiting,” discretion considers discretion that involves the hierarchal relationship between the trial and appellate court. See *id.* (internal quotation marks omitted); see also Rosenberg, *supra* note 22, at 636–43.

²³⁴ See Rosenberg, *supra* note 120, at 176–79.

²³⁵ *Id.* at 176–77.

²³⁶ See *id.* at 178–79. As an example of this type of discretion, Professor Rosenberg used a New York appellate case where, although agreeing that a lower court’s decision to deny a motion for declaratory judgment is within that court’s discretion, it had been abused here because “[i]f the ground on which the court refuses to exercise discretion is untenable, the discretion has been improperly exercised.” See *id.* (internal quotation marks omitted).

²³⁷ “The trial judge often detects something in the course of the trial that leads him to exercise his power as the ‘thirteenth juror.’ He may weigh the evidence differently from the jury, or see some other reason for setting the verdict aside.” *Id.* at 177–78.

²³⁸ See Rosenberg, *supra* note 22, at 652; see also Rosenberg, *supra* note 120, at 178 (describing an appellate court’s reversal of a lower court’s decision not to grant a mistrial).

with absolute deference and absolute appellate review as the poles,²³⁹ as a structure allowing a shifting contextual meaning,²⁴⁰ or as being completely separate from the trial court's discretion in implementing a rule.²⁴¹ Judge Friendly framed the discussion as deciding when and where to apply a broader or narrower interpretation of abuse of discretion.²⁴² Broader applications would afford expansive protection to a lower court's decisions and allow limited review by an appellate court, while narrower applications reverse this dynamic, giving "a wide scope of appellate review" and limited protection to the district court's determinations.²⁴³ Alternatively, appellate courts could consider the proper level of deference to a lower court's discretion either by "fram[ing] their review by issue, factors, reasoned analogy, and degree of discretion,"²⁴⁴ or by applying the *Pierce* factors, "not only to determine applicability[,] but also to guide *application* of the flexible abuse test."²⁴⁵

IV. IN DEFENSE OF DISCRETION: WHY A DETERMINATION OF EQUITABLE MOOTNESS SHOULD BE JUDGED FOR AN ABUSE OF DISCRETION

This Comment has outlined a framework for determining which standard of review is appropriate for an individual issue and noted some general guidelines on how much deference a specific issue deserves when reviewed for an abuse of discretion. This Part now addresses how these considerations interact with the doctrine of equitable mootness. Determining a proper standard of review for equitable mootness is especially difficult due to the doctrine's construction and the context of its review.²⁴⁶ While the majority test involves a balancing of various factors on a case-by-case basis,²⁴⁷ both the first-level and second-level appellate courts in bankruptcy appeals make their determinations based on a substantially similar record.²⁴⁸ While the first-level appellate court is the first

²³⁹ See Friendly, *supra* note 22, at 762–73.

²⁴⁰ See 1 CHILDRESS & DAVIS, *supra* note 19, §§ 4.01[3], 4.21.

²⁴¹ Post, *supra* note 22, at 211–13.

²⁴² Friendly, *supra* note 22, at 764.

²⁴³ *Id.* at 764 n.62.

²⁴⁴ 1 CHILDRESS & DAVIS, *supra* note 19, § 4.01[3].

²⁴⁵ *Id.* Childress and Davis further suggest, "The strength or presence of such factors—including judicial economy, position to judge, use of evidentiary facts, and practicality of generating a principle or rule—also may weigh heavily in a court's considered decision as to the strength and scope of review *within* an abuse of discretion standard." *Id.*

²⁴⁶ See *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1335 (10th Cir. 2009).

²⁴⁷ See *id.* at 1338–39.

²⁴⁸ See FED. R. APP. P. 10(a)(1)–(2) ("The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any"); 8 NORTON, *supra*

possible court to hear the issue and the supporting evidence,²⁴⁹ the circuit court of appeals—hearing the appeal of an appeal—normally applies de novo review to the district court’s rulings.²⁵⁰ Thus, for any reason favoring one standard, another seems to offer a countervailing consideration pushing for the other standard. However, the context in which the doctrine arises, the doctrine’s construction, and its underlying use in light of the relevant Supreme Court case law all ultimately favor review under the abuse of discretion standard.

A. Determinations of Equitable Mootness Involve Evidence and Issues that Are Considered for the First Time by the First-Level Appellate Court

For many issues in bankruptcy, the nonbankruptcy hierarchy of the federal courts is significantly restructured.²⁵¹ The district court, usually the trial court in most federal suits,²⁵² voluntarily vests the trial authority in a non-Article III court²⁵³ and takes the status of an appellate court.²⁵⁴ This situation can be problematic; the district court must then examine the bankruptcy court’s findings for error rather than substituting its own, a contrast to its normal fact-finding role. For instance, in *Universal Minerals, Inc. v. C. A. Hughes & Co.*, the district court agreed with the bankruptcy court’s factual findings but, drawing different inferences regarding a party’s intent to abandon property, reversed the bankruptcy court.²⁵⁵ As intent is a matter of fact and not a

note 37, § 170:52, at 170-154 (appeals to the applicable court of appeals “are governed, not by the Federal Rules of Bankruptcy Procedure, but rather the Federal Rules of Appellate Procedure”).

²⁴⁹ See *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.* (*In re Zenith Elecs. Corp.*), 250 B.R. 207, 213–18 (D. Del. 2000) (considering arguments and evidence regarding the plan’s substantial consummation, the appellant’s efforts to obtain a stay, and the effects on third-party reliance), *aff’d sub nom.* *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180 (3d Cir. 2001).

²⁵⁰ See, e.g., *Ins. Co. of N. Am. v. Cohn* (*In re Cohn*), 54 F.3d 1108, 1113 (3d Cir. 1995) (“Our review of the district court’s order is plenary because in bankruptcy cases the district court sits as an appellate court.”), *quoted in In re Cont’l Airlines*, 91 F.3d 553, 568 n.4 (3d Cir. 1996) (en banc) (Alito, J., dissenting) (favoring de novo review).

²⁵¹ See Laura B. Bartell, *The Appeal of Direct Appeal—Use of the New 28 U.S.C. § 158(d)(2)*, 84 AM. BANKR. L.J. 145, 146–55 (2010) (outlining the history and structure of, as well as problems created by, the current bankruptcy appellate system).

²⁵² 28 U.S.C. §§ 1331–1332 (2006), *amended by* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, §§ 101–103, 125 Stat. 758, 758–59 (granting district courts original jurisdiction over federal question and diversity suits).

²⁵³ See 28 U.S.C. § 157(a); 1 COLLIER *supra* note 27, ¶ 3.01[1]. However, it is possible that, although ceding authority to the bankruptcy courts in general, a district court reasserts its original jurisdiction and acts as the trial court for the issue. See *United States v. Schilling* (*In re Big Rivers Elec. Corp.*), 355 F.3d 415, 427–28 (6th Cir. 2004). Such exercises are then subject to the appropriate standard of review. *Id.* at 428–29.

²⁵⁴ 28 U.S.C. § 158(a).

²⁵⁵ *Universal Minerals, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 104 (3d Cir. 1981).

conclusion of law,²⁵⁶ the Third Circuit Court of Appeals held that the district court erred in substituting its judgment for that of the bankruptcy court absent a demonstration that the original factual findings were clearly erroneous.²⁵⁷ As an appellate court reviewing an appellate court, courts of appeals generally have freer reign over interpreting the district court's determinations in bankruptcy than they would in the course of normal federal litigation.²⁵⁸

However, the doctrine of equitable mootness adds a further wrinkle to the bankruptcy appellate process: as Judge Kennedy noted, it is perhaps the only situation in which an “intermediate court will be deciding an equitable issue for the first time and is the proper body to decide [it].”²⁵⁹ Equitable mootness is a defense almost solely raised on appeal, frequently because it protects reliance on a confirmed reorganization plan.²⁶⁰ Consequently, many evaluations of the merits for or against granting an equitable mootness claim almost invariably involve considerations and evidence being considered for the first time by the appellate court.²⁶¹ In this regard, when it is the first court to hear a claim of equitable mootness,²⁶² the first-level appellate court must frequently make factual determinations on new evidence offered in attached affidavits and statements and during oral argument.²⁶³ For instance, evidence that a plan has been “substantially consummated” or fully implemented arises exclusively from events occurring subsequent to a confirmed plan.²⁶⁴ The inclusion of such evidence is authorized both by the Federal Rules of Bankruptcy Procedure²⁶⁵

²⁵⁶ *Id.* at 103–04.

²⁵⁷ *Id.* at 104–05.

²⁵⁸ *See In re Cont'l Airlines*, 91 F.3d 553, 568 n.4 (3d Cir. 1996) (en banc) (Alito, J., dissenting).

²⁵⁹ *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 953 (6th Cir. 2008) (Kennedy, J., concurring).

²⁶⁰ *See, e.g., id.* at 947 (“The equitable mootness doctrine is applied in appeals from bankruptcy confirmations in order to protect parties relying upon the successful confirmation of a bankruptcy plan from a drastic change after appeal.” (emphasis added)).

²⁶¹ *See Nordhoff Invs., Inc. v. Zenith Elecs. Corp. (In re Zenith Elecs. Corp.)*, 250 B.R. 207, 213–18 (D. Del. 2000) (considering evidence regarding the plan's substantial consummation, the appellant's efforts to obtain a stay, and the effects on third-party reliance), *aff'd sub nom. Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180 (3d Cir. 2001). However, for other aspects, courts infer the reliance of third parties through the use of evidence from either the plan as confirmed or in the record below. *See In re Cont'l Airlines*, 91 F.3d at 562–63.

²⁶² It is of course possible for a claim of equitable mootness to be raised for the first time before a circuit court. *See Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009) (equitable mootness raised as defense on 28 U.S.C. § 158(d)(2) direct appeal).

²⁶³ *See, e.g., In re Zenith Elecs. Corp.*, 250 B.R. at 210–11, 213–18 & n.17.

²⁶⁴ *See, e.g., Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 624–26 (4th Cir. 2002).

²⁶⁵ *See* FED. R. CIV. P. 43(c) (“When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.”), *incorporated by* FED. R. BANKR. P. 9017. A nonmoving party can contest the information by offering counter-affidavits or

and the reviewing courts of appeals,²⁶⁶ presumably recognizing that, unlike other forms of litigation, the factual scenario in bankruptcy frequently continues to develop as a case is being appealed.²⁶⁷ Thus, the two courts are not in equivalent positions to consider an equitable mootness appeal, and it is inaccurate for courts to claim that review de novo is appropriate for that reason.²⁶⁸ Here, the second-level appellate court is not reviewing the merits of the appeal, but rather the lower court's original judgment and factual findings.

B. The Doctrine Is Fact-Intensive and Requires Case-by-Case Analysis of the Relevant Factors, Both of Which Favor Review for Abuse of Discretion

Another factor favoring deferential review is the precise implementation of the equitable mootness test itself. When the individual factual circumstances involved in resolving a specific issue are “multifarious, fleeting, special, narrow facts that utterly resist generalization,”²⁶⁹ the Supreme Court has stated that discretion is warranted to give courts time to create guiding principles and rules.²⁷⁰ Additionally, determinations that are “fact-intensive, close calls” might deserve some deference because, being so particularized to the individual situation, they “cannot be made uniform through appellate review, de novo or otherwise.”²⁷¹

In the context of equitable mootness determinations, some of these concerns are admittedly absent. Here, years of experimenting with the

attacking “the legal sufficiency and effect of the evidence.” *Huddleston v. Nelson Bunker Hunt Trust Estate*, 102 B.R. 71, 74–75 (N.D. Tex. 1989).

²⁶⁶ See *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1335 (10th Cir. 2009) (“[C]ourts generally agree that a court of appeals reviews a district court’s factual findings relating to a determination of equitable mootness for clear error”); *Liquidity Solutions, Inc. v. Winn-Dixie Stores, Inc. (In re Winn-Dixie Store, Inc.)*, 286 F. App’x 619, 622–25 & n.3 (11th Cir. 2008) (per curiam) (upholding a district court’s factual finding regarding the plan’s substantial consummation even while addressing the general rule that a district court is not allowed to make independent factual findings in reviewing a bankruptcy court’s decision).

²⁶⁷ See *Frankfurth v. Cummins (In re Cummins)*, 20 B.R. 652, 653 (B.A.P. 9th Cir. 1982) (“Ordinarily an appellate court should base its decision on the facts as they existed at the time the trial court made its decision. However, the on-going nature of bankruptcy proceedings, on occasion, creates situations where the reviewing court may take notice of fundamental events occurring after the entry of the judgment from which appeal was taken.”).

²⁶⁸ See, e.g., *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 946–47 (6th Cir. 2008).

²⁶⁹ *Pierce v. Underwood*, 487 U.S. 552, 561–62 (1987) (quoting *Rosenberg*, *supra* note 22, at 662–63) (internal quotation marks omitted).

²⁷⁰ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990); *Pierce*, 487 U.S. at 561–63.

²⁷¹ See *Cooter & Gell*, 496 U.S. at 404–05 (quoting *Mars Steel Corp. v. Cont’l Bank N.A.*, 880 F.2d 928, 936 (9th Cir. 1989)) (internal quotation marks omitted).

doctrine²⁷² have allowed for the formation of factor-based tests that encompass the aspects that courts most frequently consider when applying the doctrine.²⁷³ In this way, the facts usually most pertinent to the discussion do not “utterly resist generalization.”²⁷⁴ However, simply because the doctrine has been formalized to a degree does not automatically subject it to de novo review; for instance, despite the eventual development of guiding principles, other equitable doctrines still receive deferential review.²⁷⁵ Therefore, the doctrine should be considered in light of whether independent review would aid in the uniform application of the law or if, as a matter of course, the facts would be too particularized for full review to guarantee uniformity.²⁷⁶

Part of this question is answered by the endless variety of situations which the courts must consider when applying the test. The manner and method of the relief the appellant requests weigh significantly on any given evaluation of equitable mootness.²⁷⁷ In the easy case, the relief sought requires the complete or substantial dissolution of a plan.²⁷⁸ In such situations, the courts have found no difficulty in using equitable mootness to squelch the appeal.²⁷⁹ However, chapter 11 reorganizations, while requiring that a proposed plan meet the technical requirements of either § 1129(a) or § 1129(b),²⁸⁰ can represent a diverse range of interests that sometimes require or allow differing treatment.²⁸¹ As the reasons that parties appeal the confirmation of

²⁷² Some of the earliest threads of the doctrine can be seen in cases going back as far as the early 1980s. See *In re AOV Indus.*, 792 F.2d 1140, 1146–50 (D.C. Cir. 1986) (articulating how “common sense or equitable considerations” might moot appeals from a mostly completed plan even when relief could be granted), *vacated in part on other grounds*, 797 F.2d 1004 (D.C. Cir. 1986); see also *Trone v. Roberts Farms, Inc. (In re Roberts Farms)*, 652 F.2d 793, 798 (9th Cir. 1981) (refusing to reverse a mostly completed plan when the appellants’ failure to obtain a stay resulted in a substantial change in circumstances).

²⁷³ See *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1338–39 (10th Cir. 2009).

²⁷⁴ *Pierce*, 487 U.S. at 562 (quoting *Rosenberg*, *supra* note 22, at 662–63) (internal quotation marks omitted).

²⁷⁵ The equitable doctrine of excusable neglect, to provide an illustrating example, is reviewed for abuse of discretion. 1 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 6.06[3][b] (3d ed. 2011).

²⁷⁶ See *Cooter & Gill*, 496 U.S. at 404–05.

²⁷⁷ See *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144 (2d Cir. 2005); see also *White & Medford*, *supra* 103, at 26, 27.

²⁷⁸ *Manges v. Seattle-First Nat’l Bank (In re Manges)*, 29 F.3d 1034, 1042–43 (5th Cir. 1994) (“We must evaluate these transfers, many of which appear irreversible, against the backdrop of the relief sought—nothing less than a wholesale annihilation of the [p]lan.”).

²⁷⁹ See *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 189–90 (3d Cir. 2001) (denying relief when the appellant’s challenge went to “the very centerpiece of the plan”).

²⁸⁰ 11 U.S.C. § 1129(a)–(b) (2006).

²⁸¹ See generally 7 COLLIER *supra* note 27, ¶ 1122.03 (discussing the classification of the varying range of claims or interests in a chapter 11 plan).

reorganization plans can vary greatly,²⁸² and the types of relief requested range extensively in type and effect,²⁸³ the requested relief in the appeal must be tested individually against the interest of the other parties or the success of the plan.²⁸⁴ For instance, an appeal seeking millions of dollars might be completely infeasible without gutting a reorganized debtor in one case,²⁸⁵ while in another granting the same relief would not destroy the reorganization due to the size of the debtor.²⁸⁶

Therefore, courts frequently note that equitable mootness evaluations require individualized consideration. The court must consider “the totality of its circumstances[,]”²⁸⁷ and the evaluations do not lend themselves to “inflexible, formalistic rules.”²⁸⁸ This individualized evaluation results in at least three practical consequences. First, the various factors forming the test are “given varying weight, depending on the particular circumstances.”²⁸⁹ Even though certain factors such as substantial consummation or a failure to get or seek a stay are frequently given considerable weight,²⁹⁰ the fulfillment of either

²⁸² See *supra* text accompanying notes 55–61.

²⁸³ Compare *United States v. GWI PCS 1, Inc.*, 245 B.R. 59, 64 (N.D. Tex. 1999) (factor regarding third party interests and success of plan favored equitable mootness when granting appellant’s claims would result in \$900 million liability for emerging debtor), *aff’d, sub nom.* *United States ex rel. FCC v. GWI PCS 1, Inc. (In re GWI PCS 1, Inc.)*, 230 F.3d 788 (5th Cir. 2000), with *Schaefer v. Superior Offshore Int’l, Inc. (In re Superior Offshore Int’l, Inc.)*, 591 F.3d 350, 353–54 (5th Cir. 2009) (reversing a confirmed plan does make a plan equitably moot when granting the requested relief—increased disclosures and specificity—would not completely undo plan), and *Guardian Sav. & Loan Ass’n v. Arbors of Houston Assocs. Ltd. P’ship (In re Arbors of Houston Assocs. Ltd. P’ship)*, No. 97-2099, 1999 WL 17649, at *2–3 (6th Cir. Jan. 4, 1999) (holding the requested relief was not equitably moot when appellant did not challenge the plan, but rather only an interpretation of one section of the plan).

²⁸⁴ *In re AOV Indus.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986) (“In exercising its discretionary power to dismiss an appeal on mootness grounds, a court cannot avoid its obligation to scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole.”), *vacated in part on other grounds*, 797 F.2d 1004 (D.C. Cir. 1986).

²⁸⁵ *In re Machne Menachem, Inc.*, No. 3:07-CV-0057, 2008 WL 906476, at *4–6 (M.D. Pa. Mar. 31, 2008) (noting that a successful appeal would require the return of the \$1 million offered in consideration for releases, inhibiting the ability of the reorganized debtor to pay its debts and thus gutting the reorganization plan).

²⁸⁶ *LTV Corp. v. Aetna Cas. & Sur. Co. (In re Chateaugay Corp.)*, 167 B.R. 776, 779 (S.D.N.Y. 1994) (“It is difficult to conceive how a potential liability of, at most, several million dollars could unravel the [d]ebtors’ reorganization, which involved the transfer of billions of dollars, and which has resulted in the revival of [d]ebtors into a multi-billion dollar operation with \$200 million in working capital.”).

²⁸⁷ *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002).

²⁸⁸ See *In re AOV Indus.*, 792 F.2d at 1147–48.

²⁸⁹ See, e.g., *In re Cont’l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc).

²⁹⁰ See, e.g., *id.* (identifying the “foremost consideration” in an equitable mootness claim to be “whether the reorganization plan has been substantially consummated”).

factor is not dispositive.²⁹¹ Second, even factors that are usually less fact-intensive and easily determined, such as the failure to pursue or receive a stay,²⁹² do not in the “totality of circumstances” always cut clearly for or against a determination of equitable mootness.²⁹³ Third, although most courts have articulated the factors most pertinent to an evaluation of equitable mootness, they rarely state that these factors are the *only* considerations that must be evaluated.²⁹⁴ Therefore, a court should not be restricted from considering additional relevant facts and factors, even when not formally encoded in the circuit’s test, if doing so would allow full consideration of the individual case.²⁹⁵ However, allowing a lower court this flexibility to consider outside factors limits the ability of the reviewing court to state authoritatively that a given factor is impermissible or permissible generally; for instance, an outside factor considered useful in one case might be irrelevant in another.²⁹⁶

Such individualized analysis in granting equitable mootness therefore raises two reasons reviewing courts grant deference to a lower court’s judgment. The fact that the lower court is required to conduct a case-by-case review means that the lower court must be invested with some level of “choice” in weighing the individual factors; this choice, in many commentators’ minds, is a classic

²⁹¹ See *Manges v. Seattle-First Nat’l Bank (In re Manges)*, 29 F.3d 1034, 1042–43 (5th Cir. 1994) (“As several courts have made clear, [s]ubstantial consummation . . . is a momentous event, but it does not necessarily make it impossible or inequitable for an appellate court to grant effective relief.”) (first alteration in original) (quoting *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952 (2d Cir. 1993)) (internal quotation marks omitted); *Rochman v. Ne. Utils. Serv. Grp. (In re Pub. Serv. Co. of N.H.)*, 963 F.2d 469, 473 (1st Cir. 1992) (“The failure to obtain a stay is not sufficient ground for a finding of mootness.”).

²⁹² See, e.g., *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144–45 (2d Cir. 2005).

²⁹³ See *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1340–42 (10th Cir. 2009); *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 186–88 (3d Cir. 2001).

²⁹⁴ See *Alta. Energy Partners v. Blast Energy Servs., Inc. (In re Blast Energy Servs., Inc.)*, 593 F.3d 418, 424 n.4 (5th Cir. 2010) (stating that, although the factor test is useful, other principles of equity might be relevant to the individual determination); *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002) (noting that the doctrine “does not employ rigid rules,” and its use “include[s]” the majority test’s factors, not that such factors are the *only* considerations). But see *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 947–48 n.2 (6th Cir. 2008) (refusing to consider a factor not already in the circuit’s rule).

²⁹⁵ See *In re Manges*, 29 F.3d at 1043 (considering the fact that the relief requested would not benefit the appellants and the financial investment made by the appellee relevant to their determination).

²⁹⁶ See *id.* (considering the fact that the required relief would likely not benefit the appellants as relevant in that specific determination). However, some outside factors might never be relevant. In these cases, the reviewing court should correct this abuse of discretion. See *Noonan v. Cunard S.S. Co.*, 375 F.2d 69, 71 (2d Cir. 1967) (Friendly, J.) (noting that deference is not appropriate, even in areas usually mandating it, when the question is amenable to a simple “yes-or-no answer applicable to all cases”).

sign of invested discretion.²⁹⁷ Additionally, deferential review is appropriate since one of the principal justifications for de novo review—guaranteeing the consistent application of the law²⁹⁸—is not furthered in cases where the underlying analysis and factual concerns are inevitably individualized.²⁹⁹

C. Equitable Doctrines Like Equitable Mootness Are Usually Deferentially Reviewed

There is one last aspect to the doctrine that favors deferential review. Although the precise form of the test varies from circuit to circuit, all versions of the equitable mootness test evaluate factors focused on similar underlying issues.³⁰⁰ These shared concerns center on two general questions. If the appeal is not constitutionally moot,³⁰¹ would granting effective relief to the appellant be unfair to third party interests who acted in reliance on the plan's confirmation?³⁰² Moreover, would granting the desired relief wholly undermine the plan and reemergence of the debtor as a viable business?³⁰³ These two concerns correlate strongly with the competing policy concerns underlying equitable mootness: balancing the particular need for finality in bankruptcy with the right of the aggrieved party to meaningful appeal.³⁰⁴

The individual equitable mootness factors directly reflect the competing interests at stake. For instance, if a plan is substantially consummated, it can become much more difficult to unwind transactions without directly interfering

²⁹⁷ See Rosenberg, *supra* note 22, at 636–37 (“If the word discretion conveys to legal minds any solid core of meaning, one central idea above all others, it is the idea of *choice*.”).

²⁹⁸ *Pierce v. Underwood*, 487 U.S. 552, 585 (1987) (White, J., concurring in part and dissenting in part).

²⁹⁹ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404–05 (1990).

³⁰⁰ *Compare* Search Mkt. Direct, Inc. v. Jubber (*In re Paige*), 584 F.3d 1327, 1339 (10th Cir. 2009), and *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc), and *United States v. GWI PCS 1 Inc.* (*In re GWI PCS 1 Inc.*), 230 F.3d 788, 800 (5th Cir. 2000), with *Frito-Lay, Inc. v. LTV Steel Co.* (*In re Chateaugay Corp.*), 10 F.3d 944, 952–53 (2d Cir. 1993), and *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1048 (7th Cir. 1993).

³⁰¹ *Rochman v. Ne. Utils. Serv. Grp.* (*In re Pub. Serv. Co. of N.H.*), 963 F.2d 469, 471 & n.4 (1st Cir. 1992) (addressing the “jurisdictional” aspects of bankruptcy mootness evaluations).

³⁰² See, e.g., *Wooley v. Faulkner* (*In re SI Restructuring, Inc.*), 542 F.3d 131, 135–36 (5th Cir. 2008) (“The concept of [equitable] mootness from a prudential standpoint protects the interest[s] of non-adverse third parties who are not before the reviewing court but who have acted in reliance upon the plan as implemented. The ultimate question to be decided is whether the Court can grant relief without undermining the plan and, thereby, affecting third parties.” (first alteration in original) (footnote omitted) (quoting *Manges v. Seattle-First Nat'l Bank* (*In re Manges*), 29 F.3d 1034, 1039 (5th Cir. 1994)) (internal quotation marks omitted)).

³⁰³ See, e.g., *In re GWI PCS 1 Inc.*, 230 F.3d at 802–03.

³⁰⁴ *First Union Real Estate Equity & Mortg. Invs. v. Club Assocs.* (*In re Club Assocs.*), 956 F.2d 1065, 1069 (11th Cir. 1992).

with the plan's viability.³⁰⁵ Similarly, seeking a stay strives to prevent precisely those third party reliance interests that courts must protect in bankruptcy.³⁰⁶ Therefore, the factors are best viewed, as some courts have noted, as a means of balancing the underlying equities: the plan proponents and third party interests on one side, the appellants on the other.³⁰⁷ Indeed, every circuit has noted the underlying equitable nature of the doctrine in the course of addressing or using the doctrine.³⁰⁸ Courts review equitable doctrines deferentially to allow for the necessary "breadth and flexibility" to fashion a proper remedy.³⁰⁹ As a doctrine fundamentally rooted in equity and fundamentally tied to remedial concerns,³¹⁰ equitable mootness should thus be reviewed for abuse of discretion.

V. "GIVE THEM ONLY ENOUGH ROPE TO HANG THEMSELVES": SECOND-LEVEL APPELLATE COURTS SHOULD EXTEND ONLY LIMITED DEFERENCE TO A FIRST-LEVEL COURT'S EQUITABLE MOOTNESS DETERMINATION

While determinations of equitable mootness should be reviewed for an abuse of discretion, that does not end the present inquiry. Recognition that deference to a lower court's evaluation is either preferable or necessary rarely acts as a blank check to the lower court to rule as it wishes.³¹¹ Instead, the specific deference granted by the abuse of discretion standard can vary greatly

³⁰⁵ See, e.g., *Retired Pilots Ass'n of US Airways, Inc. v. US Airways Grp., Inc.* (*In re US Airways Grp., Inc.*), 369 F.3d 806, 810 (4th Cir. 2004) (consummation of the plan gave the debtor a needed \$1.24 billion in financing and investments).

³⁰⁶ *Frito-Lay, Inc. v. LTV Steel Co.* (*In re Chateaugay Corp.*), 10 F.3d 944, 953 (2d Cir. 1993) (considering the failure to seek a stay important because absent such stay, the irreversible transactions under the plan can occur unhindered). *Contra In re UNR Indus., Inc.*, 20 F.3d 766, 769–70 (7th Cir. 1994) (merely seeking a stay is irrelevant because "[a] stay not sought, and a stay sought and denied, lead equally to the implementation of the plan").

³⁰⁷ See *United Artists Theatre Co. v. Walton* (*In re United Artists Theatre Co.*), 315 F.3d 217, 228 (3d Cir. 2003) (noting that the court in making an equitable mootness determination "must balance the equities of both positions and determine whether it is prudent to upset the [p]lan at this date" (emphasis added)).

³⁰⁸ See *Search Mkt. Direct, Inc. v. Jubber* (*In re Paige*), 584 F.3d 1327, 1337–38 (10th Cir. 2009) (listing cases from every other circuit that adopted the doctrine when considering whether "equitable, prudential, or pragmatic considerations can render an appeal of a bankruptcy court decision moot even when the appeal is not constitutionally moot") (internal quotation marks omitted).

³⁰⁹ See 1 CHILDRESS & DAVIS, *supra* note 19, § 4.16.

³¹⁰ See, e.g., *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002).

³¹¹ The Supreme Court has repeatedly recognized that there are limitations to an exercise of the discretion granted to any specific doctrine: "[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (second alteration in original) (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d)) (internal quotation marks omitted).

depending on the specific context, the doctrine being applied, and different answers to the same question.³¹² Thus, to evaluate the problem fully, this Comment also considers what it means to be an abuse of discretion in an equitable mootness case.³¹³ While such questions are inevitably murky and the definite boundaries between types of discretion are indeterminable,³¹⁴ even a broad determination of the approximate deference aids potential appellants in determining whether to appeal a first-level appellate court's judgment on equitable mootness.³¹⁵

Although this Comment has shown that the abuse of discretion standard is preferable for reviews of equitable mootness,³¹⁶ considering "how much" deference is due is a separate inquiry³¹⁷ and thus requires a separate examination. This analysis relies on a framework suggested by Professors Steven Childress and Martha Davis and uses the *Pierce* factors to evaluate "the strength and scope of review *within*" the abuse of discretion standard.³¹⁸ It also considers *Cooter & Gell* and *Koon* and the ways those decisions have affected the *Pierce* factors. Applying these factors below, this Comment will demonstrate that there are good doctrinal and policy-based reasons for a second-level appellate court to apply a less deferential form of the abuse of discretion standard to equitable mootness determinations.

A. *Similar Reliance on the Underlying Trial Record Developed by the Bankruptcy Court Mitigates Against a Broader Grant of Deference*

As noted by courts and commentators alike, one of the strongest grounds for granting considerable deference to the district court in certain instances has been dubbed the "you are there" explanation.³¹⁹ In this exposition, the trial judge has supervised the trial from the start, observed the development of the evidence and the interactions between the parties, and can therefore best

³¹² See, e.g., 2 MOORE ET AL., *supra* note 275, ¶ 11.28[4][b] (discussing the common practice of reviewing grants of Rule 11 sanctions more stringently than denials).

³¹³ See 1 CHILDRESS & DAVIS, *supra* note 19, § 4.01[3].

³¹⁴ See *id.* § 4.21.

³¹⁵ See Storm, *supra* note 121, at 76 (reviewing a law consistently allows an appellant to "assess his or her own situation in light of similar situations decided by courts . . . to better gauge [their] likely success . . . if [they are] subjected to the same judicial decision-making process in a lawsuit").

³¹⁶ See *supra* Part IV.

³¹⁷ Post, *supra* note 22, at 213 ("[T]rial court discretion arising from the absence of appellate review is a gradient that exists in varying degrees.").

³¹⁸ See 1 CHILDRESS & DAVIS, *supra* note 19, § 4.01[3].

³¹⁹ See Rosenberg, *supra* note 120, at 182–84 (1978); see also *Pierce v. Underwood*, 487 U.S. 552, 559–61 (1987).

ascertain the credibility of witnesses.³²⁰ For these reasons, the extensive familiarity of the lower court with the individual case might give “the district court . . . insights not conveyed by the record,”³²¹ and make it the judicial actor better positioned “as a matter of the sound administration of justice,”³²² to rule on the specific issue given the context of the trial.³²³

Because an evaluation of whether a claim is equitably moot normally requires evidence demonstrating the substantial consummation of the reorganization plan,³²⁴ the reviewing appellate court will have to consider information that was not before the bankruptcy court.³²⁵ However, other factors rely much more heavily on elements from the factual record prepared by the bankruptcy court. Courts at both levels of the bankruptcy appellate process frequently make use of the underlying factual record to make predictions about the effect of the plan on third parties or on the debtor’s ability to reorganize.³²⁶ For example, in weighing these factors, it is not unusual for the first-level appellate court to rely not only on the affidavits and assertions made in oral arguments but also on the terms of the confirmed plan and the underlying record of the appeal.³²⁷ In such situations, the second-level appellate court owes little deference to the first-level appellate court’s interpretation of the underlying record prior to the first appeal. This is because

³²⁰ Rosenberg, *supra* note 22, at 663–64.

³²¹ *Pierce*, 487 U.S. at 560.

³²² *Miller v. Fenton*, 474 U.S. 104, 114 (1985), *quoted in* *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990).

³²³ For instance, where a law awarded attorney’s fees “unless *the court finds* that the position . . . was substantially justified,” the Court believed that the trial court was better positioned due to their familiarity with the case even though the issue was solely an evaluation of legal issues. *See Pierce*, 487 U.S. at 559–61 (quoting 28 U.S.C. § 2412(d)(1)(A) (2006)) (internal quotation marks omitted).

³²⁴ *See, e.g.,* *Ins. Subrogation Claimants v. U.S. Brass Corp. (In re U.S. Brass Corp.)*, 169 F.3d 957, 960–61 (5th Cir. 1999) (reviewing court of appeals considering new evidence postconfirmation); *United States v. GWI PCS 1 Inc.*, 245 B.R. 59, 62–64 (N.D. Tex. 1999) (reviewing district court considered evidence that arose postconfirmation), *aff’d sub nom. United States ex rel. FCC v. GWI PCS 1, Inc. (In re GWI PCS 1, Inc.)*, 230 F.3d 788 (5th Cir. 2000).

³²⁵ *See Manges v. Seattle-First Nat’l Bank (In re Manges)*, 29 F.3d 1034, 1041 (5th Cir. 1994) (noting that appellate courts are allowed to make factual determinations of events that have occurred since confirmation). *But see* *Liquidity Solutions, Inc. v. Winn-Dixie Stores, Inc. (In re Winn-Dixie Store, Inc.)*, 286 F. App’x 619, 624 n.3 (11th Cir. 2008) (*per curiam*) (implying that considering new evidence as an appellate court would be improper if the evidence had been challenged).

³²⁶ *See Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144–45 (2d Cir. 2005) (noting that, though there were insufficient findings of fact to rule on the other parts of the appeal, there was enough to determine that the challenged settlement was a “critical component of the [p]lan” that could not be undone “without violence to the overall arrangements”).

³²⁷ *See Nordhoff Invs., Inc. v. Zenith Elecs. Corp. (In re Zenith Elecs. Corp.)*, 250 B.R. 207, 216–19 (D. Del. 2000), *aff’d sub nom. Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180 (3d Cir. 2001).

both courts approach this evidence in comparable ways as appellate bodies, examining and applying the same standards of review to a record developed by the bankruptcy court.³²⁸

B. Development of a Broadly Applicable Rule and the Underlying Legal or Easily Determinable Factual Components Favor Less Deferential Review

The other strong reason for granting considerable deference to a lower court specifically addresses the reviewing court's ability to articulate general guiding principles at that point.³²⁹ The Supreme Court explicitly agreed with this characterization in such situations where the broad range of factual scenarios and the relatively sparse case law regarding its use prevented articulation of the key guiding principles at that time.³³⁰ In such situations, the Court reasoned that requiring more deferential review would allow courts to develop these principles better below before they would be applied universally from above.³³¹ However, subsequent Court decisions and commentators have subjected such deferential reviews to significant caveats. In situations where the lower court has predicated its discretionary decision on a clearly erroneous view of the evidence or an error of law, it has committed an abuse of discretion.³³² Additionally, extreme deference is only due to a lower court's determination when there are no clear standards governing the situation.³³³ Once such a principle *has* been articulated, however, the reviewing court can and likely should exercise greater review powers over these discretionary actions to ensure that those principles are followed.³³⁴

Many of these concerns are less operative in the context of equitable mootness. Unlike the situation described in *Pierce*, where the number of possible situations had yet to give way to guiding principles and extreme flexibility was therefore a boon,³³⁵ the adoption of equitable mootness has two

³²⁸ See *Universal Minerals, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 101–02 (3d Cir. 1981) (allowing freer review of a first-level appellate court's factual analysis since the lower court was acting as an appellate body).

³²⁹ Rosenberg, *supra* note 120, at 181–82.

³³⁰ See *Pierce v. Underwood*, 487 U.S. 552, 561–62 (1987) (citing Rosenberg, *supra* note 22, at 662–63).

³³¹ See *id.* at 562.

³³² See *Koon v. United States*, 518 U.S. 81, 100 (1996) (citation omitted) (explaining that making an error of law is an abuse of discretion), *superseded in part by statute*, Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400–01 (1990) (noting that clearly erroneous factual findings are an abuse of discretion).

³³³ See Friendly, *supra* note 22, at 775–77.

³³⁴ See *id.*

³³⁵ See *Pierce*, 487 U.S. at 562.

accompanying aspects that bear discussion here. First, the adoption of equitable mootness at the circuit level is almost always accompanied by an explication of the factors that a court should consider in making this determination.³³⁶ Second, the courts also describe the standard against which the lower court must evaluate the individual facts in granting or denying equitable mootness.³³⁷ Both of these two constraints limit, where they do not altogether eliminate, the amount of discretion any lower court can truly use.³³⁸ Thus, the reviewing court should verify that the lower court has considered the issue stringently enough to have discharged its duties satisfactorily.³³⁹

Furthermore, although the doctrine involves “a discretionary balancing of equitable and prudential factors,”³⁴⁰ this is an incomplete characterization of the doctrine as several of the important factors have legal or easily ascertainable factual measurements. Specifically, two of the four factors most frequently considered in equitable mootness determinations are whether the plan has been substantially consummated and whether and to what degree the appealing party sought a stay.³⁴¹ “Substantial consummation,” although adopted as an equitable barometer in addressing equitable mootness,³⁴² is a legal standard defined in the Code³⁴³ with significance outside of the doctrine.³⁴⁴ Since a lower court necessarily abuses its discretion if it commits

³³⁶ See, e.g., *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc) (outlining the factors considered by courts in making a determination of equitable mootness). The courts of appeals are not in agreement, however, if these factors fully encapsulate all possible concerns. Compare *Curreys of Neb., Inc. v. United Producers, Inc.* (*In re United Producers, Inc.*), 526 F.3d 942, 947–48 & n.2 (6th Cir. 2008) (refusing to consider a fourth factor), with *Manges v. Seattle-First Nat'l Bank* (*In re Manges*), 29 F.3d 1034, 1043 (5th Cir. 1994) (considering other factors relevant in addition to those within the equitable mootness doctrine).

³³⁷ See, e.g., *Retired Pilots Ass'n of US Airways, Inc. v. US Airways Grp., Inc.* (*In re US Airways Grp., Inc.*), 369 F.3d 806, 809 (4th Cir. 2004) (noting an appeal is “equitably moot when it becomes impractical and imprudent to upset the plan of reorganization at this late date” (quoting *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002)) (internal quotation marks omitted)).

³³⁸ See Rosenberg, *supra* note 22, at 658–60.

³³⁹ See *Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm.* (*In re Pac. Lumber Co.*), 584 F.3d 229, 244 n.19 (5th Cir. 2009) (noting that “[e]quitable mootness should protect legitimate expectations of parties to bankruptcy cases but should not be a shield for sharp or unauthorized practices”).

³⁴⁰ *In re Cont'l Airlines*, 91 F.3d at 560.

³⁴¹ *Search Mkt. Direct, Inc. v. Jubber* (*In re Paige*), 584 F.3d 1327, 1339 (10th Cir. 2009).

³⁴² See *Curreys of Neb., Inc. v. United Producers, Inc.* (*In re United Producers, Inc.*), 526 F.3d 942, 948 (6th Cir. 2008) (“If a plan has been substantially consummated there is a greater likelihood that overturning the confirmation plan will have adverse effects on the success of the plan and on third parties.”).

³⁴³ 11 U.S.C. § 1101(2) (2006).

³⁴⁴ See 7 COLLIER, *supra* note 27, ¶ 1101.02 (addressing uses of the concept of substantial consummation explicitly in the Code and in bankruptcy generally).

an error of law,³⁴⁵ the reviewing court should not hesitate to perform its appellate duties to maintain a uniform definition regarding this legal standard. Additionally, it is generally fairly easy to determine which party is favored by the factor inquiring whether a stay pending appeal of the confirmed plan was either received or at least sought at each stage of the litigation.³⁴⁶ Even the more complex situations involving this factor are not generally so factually nuanced or complex as to place the reviewing court at too great a disadvantage in evaluating this factor.³⁴⁷ Thus, although the ultimate question irrefutably deals with inherently prudential or equitable concerns,³⁴⁸ second-level appellate courts are not terribly disadvantaged in reviewing certain aspects of an equitable mootness determination.

C. Significant Risk to Appellant's Interests Arising from an Erroneous Decision Favors a More Thorough Review of the First-Level Appellate Court's Grant of Equitable Mootness

The final aspect significantly favoring less deferential review arises from the risks to either party in the situation of an erroneous determination below. On this front, the situation in *Pierce* provides useful guidance.³⁴⁹ There, the Court noted that the "substantial amount of the liability created by the [d]istrict [j]udge's decision" favored de novo review.³⁵⁰ However, noting that this was not the norm and the risks to an adversely affected party were normally much more reasonable, the Court applied the more deferential standard because "generality rather than the exception must form the basis for [the] rule."³⁵¹

In cases involving equitable mootness determinations, the risks and potential liability are not uniformly definable due to the wide-ranging interests and potential remedies that exist within a chapter 11 plan.³⁵² However, the potential financial liability at play in the average chapter 11 case is frequently

³⁴⁵ *Koon v. United States*, 518 U.S. 81, 100 (1996), *superseded in part by statute*, Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

³⁴⁶ *See Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1039 (5th Cir. 1994) ("[I]n many of the cases in which bankruptcy appeals were dismissed as [equitably] moot, the appellants failed to seek a stay.").

³⁴⁷ *See Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1341 (10th Cir. 2009) (noting that the instant case presented "a sort of middle ground": although the appellants sought a stay from the bankruptcy court and district court, they did not appeal the stay's denial, nor did they seek mandamus relief).

³⁴⁸ *See, e.g., id.* at 1337–38.

³⁴⁹ *Pierce v. Underwood*, 487 U.S. 552, 563 (1987).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *See supra* text accompanying notes 55–61 & 277–86.

much higher than that in *Pierce*.³⁵³ Additionally, an overzealous application of the equitable mootness doctrine can result in a first-level appellate court depriving an appellant of the right to have her appeal heard on the merits, even in situations where meaningful and equitable relief could still be granted.³⁵⁴ Given the importance of allowing meritorious appeals in the American system of justice,³⁵⁵ as well as the significant time lags between when an appeal is filed in the lower courts and when it is heard on appeal at both levels that increase the likelihood of substantial consummation of the plan,³⁵⁶ a second-level appellate court should not be allowed to rely solely on deference to a lower court to avoid its “judicial duty to examine carefully each request for relief.”³⁵⁷ By giving the first-level appellate court some discretion, but not abdicating their review duties completely, reviewing courts can ensure that the application of the equitable mootness doctrine is “limited in scope and cautiously applied.”³⁵⁸

VI. PROPOSALS AND SUGGESTIONS FOR IMPLEMENTING THIS STANDARD

This Comment has argued that the universal adoption of an abuse of discretion standard that does not fully defer to the first-level appellate court’s determination would appropriately balance the competing needs for finality and the right to a meaningful appeal. Many of the actions necessary to properly implement this standard could be easily and painlessly done. When exercising its discretion, the first-level appellate court should be required to describe in sufficient detail its reasons for its determination of equitable mootness. This

³⁵³ Compare *Retired Pilots Ass’n of US Airways, Inc. v. US Airways Grp., Inc.* (*In re US Airways Grp., Inc.*), 369 F.3d 806, 810–11 (4th Cir. 2004) (reinstating debtor’s liability for pension plan eliminated via “distress termination” would directly and substantially interfere with confirmed plan and debtor’s chances of reorganization), and *United States v. GWI PCS 1 Inc.* (*In re GWI PCS 1 Inc.*), 230 F.3d 788, 792–95 (5th Cir. 2000) (appellant sought to reinstate a debt of almost \$900 million for the sale of an asset sold at \$1.06 billion, but presently worth \$166 million), with *Pierce*, 487 U.S. at 563 (median cost of attorney’s fee award against government less than \$3,000).

³⁵⁴ See *Alta. Energy Partners v. Blast Energy Servs., Inc.* (*In re Blast Energy Servs., Inc.*), 593 F.3d 418, 425–26 (5th Cir. 2010) (remanding an equitable mootness determination because the district court had not adequately demonstrated, and the record did not support, that the relief requested would interfere with either the plan or the rights of third parties).

³⁵⁵ See Rosenberg, *supra* note 22, at 641–42.

³⁵⁶ See *In re UNR Indus., Inc.*, 20 F.3d 766, 768–69 (7th Cir. 1994) (describing how several years passed between plan confirmation and resolution of the appeals before the district court and, as a result, the Court of Appeals for the Seventh Circuit heard the case three years after confirmation).

³⁵⁷ *In re AOV Indus.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986) (refusing to find an appeal moot automatically because the plan had been substantially consummated), *vacated in part on other grounds*, 797 F.2d 1004 (D.C. Cir. 1986).

³⁵⁸ *In re Cont’l Airlines*, 91 F.3d 553, 559 (3d Cir. 1996) (en banc).

analysis would allow the appellate court to better evaluate that determination.³⁵⁹ Additionally, the lower court should only invoke equitable mootness to deny an evaluation on the merits of a specific claim and not to dismiss an entire appeal.³⁶⁰ If and only if the lower court has taken both of these steps and exercised its discretion soundly in weighing the specific facts and factors in the instant case, the second-level appellate court should be more hesitant to reverse the lower court. If the lower court did not justify its position adequately or fundamentally misapplied the doctrine of equitable mootness, the reviewing court should not hesitate either to review the issue itself³⁶¹ or, though less preferable, remand it back to the lower court.³⁶²

In these ways, the lighter abuse of discretion standard adopted by the Tenth Circuit in *In re Paige* impressively balances these competing demands. Throughout its analysis, the court paid considerable attention to the claims and facts at hand and outlined in considerable detail its reasons for reaching its final conclusion.³⁶³ Although refusing to give deference to the lower court's determinations when the lower court impermissibly shifted the burden for a specific factor,³⁶⁴ the court's standard demonstrates a tacit recognition of both the desirability of finality in bankruptcy and of the fact-specific nature of the underlying examination. This fine line allows a reviewing court to discharge its appellate duties by ensuring that the lower court's discretion was "guided by sound legal principles."³⁶⁵ However, it also ensures that, when the lower court has considered the issue thoroughly, individuals can attach greater finality to the opinion.³⁶⁶

A simple procedural change would further buttress the viability of this standard. Equitable mootness determinations by a first-level appellate court

³⁵⁹ See Rosenberg, *supra* note 22, at 665–66.

³⁶⁰ In the words of the Fifth Circuit Court of Appeals, appellate courts should "apply equitable mootness with a scalpel rather than an axe." See *Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 240–53 (5th Cir. 2009) (finding only two of the eight alleged issues actually equitably moot on direct appeal).

³⁶¹ See *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1338–49 (10th Cir. 2009).

³⁶² See *Alta. Energy Partners v. Blast Energy Servs., Inc. (In re Blast Energy Servs., Inc.)*, 593 F.3d 418, 424–26, 428 (5th Cir. 2010) (remanding when the lower court did not fully explain how a determination on the merits would interfere with the rights of third parties).

³⁶³ See *In re Paige*, 584 F.3d at 1340–49. Compare this to the rather cursory treatment that the lower court gave some of the analysis. See *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, No. 2:07-CV-822 TS, 2008 WL 2064628, at *5–7 (D. Utah May 13, 2008).

³⁶⁴ See *In re Paige*, 584 F.3d at 1333–34.

³⁶⁵ *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.).

³⁶⁶ See *Sutton v. Weinman (In re Centrix Fin., LLC)*, 394 F. App'x 485 (10th Cir. 2010) (upholding a dismissal for equitable mootness when the lower court had considered the issue stringently).

necessitate the consideration of factual developments between the confirmation of the plan and the appeal itself when a stay is not granted.³⁶⁷ It also involves arguments about the individual reliance interests of parties in the confirmation of the plan, as well as the effect of undoing the plan, which might not have been adequately addressed in the bankruptcy court's record. Thus, the second-level appellate court's ability to consider the issue might be so unduly limited as to require remanding the issue when the facts on postconfirmation matters are disputed³⁶⁸ or when the original record is spotty.³⁶⁹ This is not favorable from any perspective, as it leads to one of two equally poor results. It draws out the bankruptcy appellate process further than necessary when the factual determinations are limited in scope, significantly undercutting the desired finality. Alternatively, such a cramped capacity undercuts the viability of an abuse of discretion standard by limiting the weight that a second-level appellate court can reasonably attribute to the necessary determinations by the first-level appellate court.

An explicit procedural rule allowing a first-level appellate court the right to engage in more extensive fact-finding that is limited solely to evaluating fully the changed circumstances following confirmation solves these issues. It would allow the first-level appellate courts the leeway to determine more accurately a claim of equitable mootness and would bolster the ability of the second-level appellate courts to give deference to the lower court's independent determinations without unduly extending the process.³⁷⁰

CONCLUSION

There are a host of reasons why circuits should review equitable mootness determinations by a first-level appellate court for an abuse of discretion.

³⁶⁷ The benefit of a stay pending appeal is that it affords the appellant "the opportunity . . . to hold things in stasis, to prevent reliance on the plan of reorganization while the appeal proceeds." *In re UNR Indus., Inc.*, 20 F.3d 766, 769–70 (7th Cir. 1994). Thus, since the stay prevents the plan from being substantially consummated or from being relied upon by third parties, a court granting a stay severely limits the chances that the appeal will be found equitably moot. *In re Paige*, 584 F.3d at 1340–41.

³⁶⁸ See *Huddleston v. Nelson Bunker Hunt Trust Estate*, 102 B.R. 71, 76–77 (N.D. Tex. 1989) (remanding when facts critical to determining mootness were in dispute).

³⁶⁹ See *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994) (noting that, if deciding the issue of equitable mootness were dispositive, the court would be forced to remand since the record did not allow the court to determine "whether modification of the plan of reorganization would bear unduly on the innocent").

³⁷⁰ Cf. *In re Cont'l Airlines*, 91 F.3d 553, 568 n.4 (3d Cir. 1996) (en banc) (Alito, J., dissenting) (arguing that the general structure of bankruptcy appeals would favor de novo review since the court of appeals is "in just as good a position to make this determination as was the district court, which sat as an appellate court in this case").

Doctrinally, deferential review of equitable mootness follows from the fact-intensive and individualized nature of the evaluation. This standard would likewise account for the continued development of the issues during the appeal and maintain continuity with the deferential review that other equitable, prudential, and discretionary remedies receive. From a policy perspective, implementing this standard supports the focus in bankruptcy cases on finality by limiting spurious appeals and minimizing the chances that the reviewing court will overturn a confirmed plan on appeal.

However, resolving which standard of review the courts should follow is not the end of the examination. After one determines that a doctrine merits deferential review, one must also figure out the degree of deference that the individual question deserves. For equitable mootness, the discretion of the lower courts is and should be limited for several reasons. The declaration of broader rules and general principles by every circuit demonstrates the intent by the reviewing courts to focus the analysis along specific, if not necessarily rigid, lines. The shared reliance on large portions of the underlying factual record as well as the significant risks to the appellant's financial and legal interests also cut in favor of a more exacting review.

Thus, while finality might deserve systemic protection on appeal, it should not operate as a *carte blanche* to justify a lower court's whims or to allow it to shirk its duties to examine each case scrupulously. By adopting a less deferential abuse of discretion test, the Tenth Circuit's analysis in *In re Paige* showed a tacit understanding of these competing needs by conditioning its deference in reviews of equitable mootness on a thorough and sound consideration of the issue below rather than merely as a matter of course. Since this position appropriately balances the underlying tensions in bankruptcy appeals—that is, the need for finality and the need for meaningful review—courts of appeals should adopt this standard when reviewing equitable mootness.

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